(U) ANNEX TO THE REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM

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U.S. Department of Justice
Office of the Inspector General

A Review of the Department of Justice's Involvement with the President's Surveillance Program (U)



Department of Justice
Office of the Inspector General
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CHAPTER ONE
INTRODUCTION (U)

On October 4, 2001, three weeks after the terrorist attacks of September 11, 2001, the President issued a Top Secret Presidential Authorization to the Secretary of Defense directing that the signals intelligence capabilities of the National Security Agency (NSA) be used to detect and prevent further attacks in the United States. The Presidential Authorization stated that an extraordinary emergency existed permitting the use of electronic surveillance within the United States for counterterrorism purposes, without a court order, under certain circumstances. For over 6 years, this Presidential Authorization was renewed at approximately 30 to 45 day intervals to authorize the highly classified NSA surveillance program, which was given the cover term "Stellar Wind."[1] ~~(TS//STLW//SI//OC/NF)~~

Under these Presidential Authorizations and subsequently obtained Foreign Intelligence Surveillance Court (FISA Court) orders, the NSA intercepted the content of international telephone and e-mail communications of both U.S. and non-U.S. persons when certain criteria were met. In addition, the NSA collected vast amounts of telephony and e-mail meta data – that is, communications signaling information showing contacts between and among telephone numbers and e-mail addresses, but not including the contents of the communications. [redacted][2] ~~(TS//STLW//SI//OC/NF)~~

Within the Department of Justice (Department or Justice Department) and the Intelligence Community, the different types of information collected under the NSA program came to be referred to as three different "baskets" of information. The collection of the content of telephone and e-mail

[1] This program is also known as the President's Surveillance Program (PSP). In Title III of the Foreign Intelligence Surveillance Act Amendments Act of 2008 (FISA Amendments Act), the President's Surveillance Program is defined as

> the intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007, including the program referred to by the President in a radio address on December 17, 2005 (commonly known as the Terrorist Surveillance Program).

FISA Amendments Act, Title III, Sec. 301(a)(3). (U)

[2] [redacted]

communications was referred to as basket 1. The collection of telephone meta data – including information on the date, time, and duration of the telephone call, the telephone number of the caller, and the number receiving the call – was referred to as basket 2. The collection of e-mail meta data – including the "to," "from," "cc," "bcc," and "sent" lines of an e-mail, but not the "subject" line or content of the e-mail – was referred to as basket 3. ~~(TS//STLW//SI//OC/NF)~~

The content and meta data information was used by the NSA, working with other members of the Intelligence Community, to generate intelligence reports. [redacted] By March 2006, over [redacted] individual U.S. telephone numbers and [redacted] e-mail addresses had been "tipped" to the FBI as leads, the vast majority of which were disseminated to FBI field offices for investigation or other action. Some Stellar Wind-derived information also was disseminated to the larger Intelligence Community through traditional intelligence reporting channels.[3] ~~(TS//STLW//SI//OC/NF)~~

In addition to the FBI's receipt of information from the program, the Justice Department was involved in the program in other ways. Most significantly, the Department's Office of Legal Counsel (OLC) provided advice to the White House and the Attorney General on the overall legality of the Stellar Wind program. In addition, the Department's Office of Intelligence Policy and Review (now called the Office of Intelligence in the Department's National Security Division) worked with the FBI and NSA to justify the inclusion of Stellar Wind-derived information in applications seeking orders under the Foreign Intelligence Surveillance Act (FISA), and when unable to do so, to exclude such information from the applications. The Department's National Security Division (NSD) also submitted classified *ex parte* legal filings in federal courts to address any Stellar Wind reporting concerning defendants during discovery in international terrorism prosecutions. ~~(TS//STLW//SI//OC/NF)~~

Beginning in December 2005, aspects of the Stellar Wind program were publicly disclosed in media reports, originally in a series of articles by The New York Times. After these articles disclosed the telephone and e-mail content collection (basket 1), the President, Attorney General Alberto Gonzales, and other Administration officials publicly confirmed the

[3] The larger Intelligence Community also includes components within other Departments, such as the Departments of Homeland Security, Treasury, Defense, and State. (U)

existence of this part of the program. However, the other aspects of the program – the collection of telephone and e-mail meta data – have not been publicly confirmed. ~~(TS//STLW//SI//OC/NF)~~

The President and other Administration officials labeled the NSA collection of information that was publicly disclosed as "the Terrorist Surveillance Program," although this name was sometimes used within the Intelligence Community to refer to the entire Stellar Wind program. The program was also referred to by other names, such as the "Warrantless Wiretapping Program" or the "NSA Surveillance Program." As discussed above, the technical name for the program, and the term we generally use throughout this report, is the Stellar Wind program.[4] ~~(S//NF)~~

This report describes the Office of the Inspector General's (OIG) review of the Department's role in the Stellar Wind program. Our review discusses the evolution of the Stellar Wind program, including the changes in the Department's legal analyses of the program, the operational changes to the program, and the eventual transition of the program from presidential authority to statutory authority under FISA. The report also assesses the FBI's use of information derived from the Stellar Wind program, including the impact of the information in FBI counterterrorism investigations. ~~(TS//STLW//SI//OC/NF)~~

I. Methodology of OIG Review (U)

During the course of this review, the OIG conducted approximately 80 interviews. Among the individuals we interviewed were former White House Counsel and Attorney General Gonzales; former Deputy Attorney General James Comey; former NSA Director Michael Hayden; FBI Director Robert Mueller, III; former Counsel for Intelligence Policy James Baker; former Assistant Attorneys General for OLC Jay Bybee and Jack Goldsmith; former Principal Deputy and Acting Assistant Attorney General for OLC Steven Bradbury; former Deputy Assistant Attorney General for OLC and Associate Deputy Attorney General Patrick Philbin; and former Assistant Attorneys General for the NSD Kenneth Wainstein and Patrick Rowan. We also interviewed senior FBI Counterterrorism Division officials, the FBI General Counsel and other FBI attorneys, FBI special agents and intelligence analysts, and senior officials in the Department's Criminal and National Security Divisions.[5] (U)

[4] Stellar Wind is classified as a Top Secret/Sensitive Compartmented Information program. ~~(S//NF)~~

[5] Although the FBI is a component of the Department of Justice, references in this report to Department officials generally mean non-FBI Department officials. This

(Cont'd.)

We attempted to interview former Attorney General John Ashcroft, but he declined our request for an interview. (U)

In addition, we attempted to interview former Deputy Assistant Attorney General for OLC John Yoo, who drafted the early legal memoranda supporting the legality of the Stellar Wind program. Yoo, through his counsel, declined our request for an interview. ~~(TS//SI//NF)~~

We also attempted to interview White House officials regarding the program, including Andrew Card, former Chief of Staff to President George W. Bush. We made our request for an interview of Card both directly to Card and through the Office of the Counsel to the President (White House Counsel's Office). Card did not grant our request for an interview. Similarly, we attempted to interview David Addington, former Counsel to Vice President Richard B. Cheney. We contacted the Office of the Vice President, but that office did not respond to our request for an interview of Addington. (U)

We believe that we were able to obtain a full picture of the evolution of the program and the theories supporting its legality. However, the refusal by White House officials, former Attorney General Ashcroft, and former Deputy Assistant Attorney General Yoo to be interviewed hampered our ability to fully investigate the process by which the White House and the Justice Department arrived at the initial legal rationale to support the program. In addition, because of our inability to interview Ashcroft, we could not fully determine what efforts the Department took to press the White House for additional Department attorneys to be read into Stellar Wind to work on the legal analysis of the program during its first two years of operation. ~~(TS//SI//NF)~~

In our review, we also examined thousands of electronic and hard copy documents, including the Presidential Authorizations and threat assessments, OLC legal memoranda supporting the program, contemporaneous notes and e-mails of various senior Department and FBI officials, and FISA Court pleadings and orders. We also reviewed NSA materials, including NSA OIG reports on the Stellar Wind program and correspondence between the NSA Office of General Counsel and the Department. ~~(TS//SI//NF)~~

In addition, we received from the FBI an electronic database of its collection of Electronic Communications (EC) that were used to disseminate

distinction is especially relevant to our discussion of the number of Department personnel read into the Stellar Wind program, as distinguished from the number of FBI personnel read into the program. (U//~~FOUO~~)

Stellar Wind-derived leads to FBI field offices. This database contained approximately [redacted] ECs, including leads to the FBI's 56 field offices, and responses from those field offices, among other documents. The OIG used this database to confirm information it obtained through interviews and to assist in our analysis of FBI investigations that were based on Stellar Wind information. ~~(TS//STLW//SI//OC/NF)~~

II. Organization of this Report (U)

Chapter Two of this report provides an overview of the primary legal authorities that are relevant to the Stellar Wind program. This chapter also discusses the Presidential Authorizations that were issued to approve the program. (U//~~FOUO~~)

Chapter Three describes the inception and early implementation of the Stellar Wind program from September 2001 through April 2003. This chapter includes a description of the early OLC legal memoranda on the legality of Stellar Wind, how the program was technically implemented, the FBI's early participation in the program, and the FISA Court's first awareness of the program. ~~(TS//SI//NF)~~

Chapter Four covers the period from May 2003 through May 2004 when the legal rationale for the program was substantially reconsidered by the Justice Department. This chapter details in particular the events of March 2004 when the White House decided to continue the program without the Department's certification of a Presidential Authorization. During this time, Attorney General Ashcroft was hospitalized and Deputy Attorney General Comey temporarily exercised the powers of the Attorney General in his capacity as Deputy Attorney General. Comey declined to recertify the Presidential Authorization approving the program based on legal advice he received from OLC Assistant Attorney General Jack Goldsmith, who questioned the adequacy of the legal support for aspects of the program. Comey's decision prompted a significant dispute between the White House and the Justice Department, which resulted in White House Counsel Gonzales and White House Chief of Staff Card visiting Ashcroft in his hospital room in an unsuccessful attempt to have Ashcroft recertify the program. This chapter also describes the background to the dispute, the events related to the hospital visit, the threat by Department officials to resign over the dispute, and the eventual resolution of the dispute. ~~(TS//SI//NF)~~

Chapter Five discusses the transition, in stages, from a program based on Presidential Authorizations to collection activities authorized under the FISA statute. This transition took place in stages between July 2004 and January 2007. This chapter also summarizes legislation in 2007

and 2008 designed to modernize certain provisions of FISA. ~~(TS//STLW//SI//OC/NF)~~

Chapter Six discusses the use of Stellar Wind information by the FBI. It describes the process by which the FBI disseminated Stellar Wind-derived leads to FBI field offices under a program called [redacted] as well as the impact and effectiveness of the Stellar Wind program to the FBI's counterterrorism efforts. ~~(TS//STLW//SI//OC/NF)~~

Chapter Seven examines the Department's handling of discovery issues related to Stellar Wind-derived information in international terrorism prosecutions. ~~(TS//STLW//SI//OC/NF)~~

Chapter Eight analyzes testimony and public statements about aspects of the Stellar Wind program by Attorney General Gonzales. We assess whether the Attorney General's statements, particularly his testimony to the Senate Judiciary Committee in February 2006 and July 2007, were false, inaccurate, or misleading. ~~(S//NF)~~

Chapter Nine contains our conclusions and recommendations. (U)

CHAPTER TWO
LEGAL AUTHORITIES (U)

This chapter summarizes the primary legal authorities referred to throughout this report concerning the Stellar Wind program. These authorities include Article II, Section 2 of the Constitution; the Fourth Amendment to the Constitution; the Foreign Intelligence Surveillance Act; the Authorization for Use of Military Force Joint Resolution (AUMF) passed by Congress after the terrorist attacks of September 11, 2001; Executive Order 12333; and the Presidential Authorizations specifically authorizing the Stellar Wind program. Other authorities, including relevant criminal statutes and judicial opinions, are discussed throughout the report. ~~(TS//SI//NF)~~

I. Constitutional, Statutory, and Executive Order Authorities (U)

A. Article II, Section 2 of the Constitution (U)

Article II, Section 2 of the Constitution, which was one of the primary authorities cited in the Presidential Authorizations in support of the legality of the Stellar Wind program, provides in relevant part:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices ~~(TS//SI//NF)~~

B. The Fourth Amendment (U)

The Fourth Amendment to the Constitution, which also was raised as an important factor in the analysis of the legality of the Stellar Wind program, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. ~~(TS//SI//NF)~~

C. The Foreign Intelligence Surveillance Act (FISA)[6] (U)

The Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, et seq., was enacted in 1978 to "provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes." S. Rep. No. 95-701, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3977. Three major FISA issues are covered in this report. First, as discussed in Chapter Four, FISA was central to a controversy that arose in late 2003 and early 2004 when officials in the Office of Legal Counsel (OLC) and others viewed FISA as potentially in conflict with the legal rationale for at least one aspect of the Stellar Wind program. OLC officials reasoned that if courts viewed FISA in isolation, they might conclude that Congress intended to regulate the President's power to conduct electronic surveillance during wartime, thereby raising questions about the legality of aspects of the program. ~~(TS//STLW//SI//OC/NF)~~

Second, after the FISA Court was informed about the Stellar Wind program in January 2002, it required the government to carefully scrutinize each FISA application to ensure that no Stellar Wind-derived information was relied upon in support of a FISA application without the Court's knowledge, and later without its consent. This process, known as "scrubbing," is discussed in Chapters Three and Six.
~~(TS//STLW//SI//OC/NF)~~

Third, beginning in July 2004, the Stellar Wind program was brought under FISA authority in stages, with the entire program brought under FISA authority by January 2007. In August 2007 and again in July 2008, FISA was amended, and [redacted] The migration of the Stellar Wind program from presidential authority to FISA authority, as well as legislation subsequently enacted to modernize FISA, is discussed in Chapter Five.
~~(TS//STLW//SI//OC/NF)~~

In the following sections, we summarize relevant provisions of FISA as they related to the Stellar Wind program. ~~(TS//SI//NF)~~

1. Overview of FISA (U)

FISA authorizes the federal government to engage in electronic surveillance and physical searches, to use pen register and trap and trace

[6] Unless otherwise indicated, all references to FISA are to the statute as it existed prior to the Protect America Act of 2007 and the FISA Amendments Act of 2008. (U)

devices, and to obtain business records to acquire inside the United States foreign intelligence information by, in some instances, targeting foreign powers and agents of foreign powers.[7] FISA also permits the targeting of foreign powers and their agents who are located outside the United States. As a general rule, the FISA Court must first approve an application by the government before the government initiates electronic surveillance. FISA applications must identify or describe the "target" of the surveillance, and must establish probable cause to believe that the target is a "foreign power" or "agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."[8] 50 U.S.C. § 1804(a)(4)(A) & (B). ~~(TS//SI//NF)~~

FISA provides four exceptions to the requirement of obtaining judicial approval prior to conducting electronic surveillance: (1) for electronic surveillance directed at certain facilities where the Attorney General certifies that the electronic surveillance is solely directed at communications transmitted by means used exclusively between or among foreign powers or from property under the open and exclusive control of a foreign power, 50 U.S.C. § 1802; (2) where the Attorney General determines an emergency exists and authorizes emergency surveillance until the information sought is obtained, the after-filed application for an order is denied, or the expiration of 72 hours from the time of Attorney General authorization, 50 U.S.C. § 1805(f); (3) for training and testing purposes, 50 U.S.C. § 1805(g); and (4) for 15 days following a congressional declaration of war, 50 U.S.C. § 1811.[9] (U)

The 15-day war declaration exception to FISA's warrant requirement was particularly relevant to the events of 2004, when OLC reassessed its prior opinions concerning the legality of the Stellar Wind program. ~~(TS//SI//NF)~~

[7] This report is primarily concerned with the provisions of FISA that authorize electronic surveillance, pen register and trap and trace devices, and access to certain business records. ~~(TS//SI//NF)~~

[8] The terms "foreign power" and "agent of a foreign power" are defined in FISA at 50 U.S.C. § 1801(a) & (b). "Foreign power" is defined, inter alia, as "a group engaged in international terrorism or activities in preparation therefor;" 50 U.S.C. § 1801(a)(4). An "agent of a foreign power" may be a U.S. person, defined at 50 U.S.C. § 1801(i) to mean, inter alia, a United States citizen or permanent resident alien. The term "facilities" is not defined in FISA. (U)

[9] The Attorney General's emergency surveillance authority under 50 U.S.C. § 1805(f) was extended to 7 days under Section 105(a) of the FISA Amendments Act of 2008. (U)

As discussed in Chapter Four [redacted]

~~(TS//SI//NF)~~

Another FISA provision prohibits persons from intentionally engaging in electronic surveillance "under color of law except as authorized by statute[.]" 50 U.S.C. § 1809(a)(1). As discussed in Chapter Eight, in 2006 the Justice Department asserted in a publicly released legal analysis that this provision did not preclude certain warrantless electronic surveillance activities because such surveillance was "authorized by" subsequent legislative enactments – principally the AUMF. The Department also asserted that the AUMF "confirms and supplements the President's constitutional authority" to conduct warrantless electronic surveillance against the enemy during wartime. (U)

2. FISA Applications and Orders (U)

FISA applications were presented to the FISA Court by the Department's Office of Intelligence Policy and Review (OIPR).[10] Department and FBI officials familiar with the preparation and presentation of FISA applications described this process as extremely time-consuming and labor intensive. (U)

Each application must be approved and signed by the Attorney General (or Acting Attorney General) or Deputy Attorney General and must include the certification of a federal officer identifying or describing the target of the electronic surveillance; a "statement of the facts and circumstances relied upon by the applicant to justify his belief" that the target is a foreign power or agent of a foreign power and that the electronic surveillance is directed at the facilities or places used or to be used by the target; a statement of proposed minimization procedures; and a detailed description of the nature of the information sought and the type of communication or activities to be subjected to the surveillance. 50 U.S.C. § 1804(a)(1)-(6).[11] The application must also include the certification of a

[10] The Office of Intelligence Policy and Review became a part of the Department's National Security Division, which was created in September 2006. As of April 2008, the Office of Intelligence Policy and Review was renamed the Office of Intelligence. This organizational change did not affect the FISA application process. (U)

[11] FISA defines minimization procedures as

> [s]pecific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the

(Cont'd.)

high-ranking executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense that the information sought is deemed to be foreign intelligence information, that such information "cannot reasonably be obtained by normal investigative techniques," and that a "significant purpose" of the surveillance is to obtain foreign intelligence information.[12] Id. at § 1804(a)(7). (U)

FISA orders authorize electronic surveillance of U.S. persons for 90 days. FISA orders may be renewed upon the same basis as the underlying order. 50 U.S.C. § 1805(e). As noted, FISA also provides for the emergency use of electronic surveillance. When the Attorney General reasonably determines that an emergency situation exists, the use of electronic surveillance may be approved for a period of up to 72 hours (and under the FISA Amendments Act of 2008, up to 7 days) without a FISA order. 50 U.S.C. § 1805(f). (U)

3. FISA Court (U)

The FISA statute established the FISA Court to review applications and issue orders. The FISA Court initially was composed of seven U.S. District Court judges designated by the Chief Justice of the U.S. Supreme Court to serve staggered, non-renewable 7-year terms.[13] 50 U.S.C.

particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information

50 U.S.C. § 1801(h)(1). (U)

[12] As initially enacted, FISA required officials to certify that "the purpose" of the surveillance was to obtain "foreign intelligence information." However, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USA PATRIOT Act) was enacted in October 2001 and amended this language in FISA to require only that officials certify that "a significant purpose" of the surveillance was to obtain foreign intelligence information. 50 U.S.C. § 1804(a)(7)(B). This amendment, along with post-September 11 changes to Attorney General guidelines on intelligence sharing procedures and a ruling by the FISA Court of Review, removed the so-called "wall" that had existed between intelligence-gathering activities and criminal investigations. See Memorandum from the Attorney General to Director of the FBI, et al., entitled "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI" (March 6, 2002); *In re Sealed Case*, 310 F.3d 717, 727 (For. Int. Surv. Ct. Rev. 2002)(FISA did not "preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution."). (U)

[13] To achieve staggered terms, the initial appointments ranged from one to seven years. 50 U.S.C. § 1803(d). (U)

§ 1803(a) & (d). The number of judges serving on the FISA Court was increased to 11 by the USA PATRIOT Act of 2001. (U)

D. Authorization for Use of Military Force (U)

On September 18, 2001, in response to the terrorist attacks of September 11, Congress approved an Authorization for Use of Military Force Joint Resolution (AUMF). In conjunction with the President's Commander-in-Chief authority under Article II of the Constitution, this legislation has been cited in support of the President's authority to conduct electronic surveillance without judicial approval. See, e.g., Legal Authorities Supporting the Activities of the National Security Agency Described by the President, January 19, 2006 (Justice Department White Paper), at 6-17. The AUMF states, in pertinent part:

> To authorize the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States.
>
> Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
>
> Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and
>
> Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
>
> Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
>
> Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> . . .
>
> SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES
>
> (a) IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (U)

Pursuant to this authority, the President ordered the U.S. armed forces to invade Afghanistan to combat al Qaeda terrorists and overthrow the Taliban government that had given them refuge. (U)

In 2004, OLC took the position that the AUMF was "expressly designed to authorize whatever military actions the Executive deems appropriate to safeguard the United States[,]" including the use of electronic surveillance to detect and prevent further attacks. See Office of Legal Counsel Memorandum, May 6, 2004, at 31, citing 50 U.S.C. § 1811. In addition, the Justice Department asserted in the 2006 White Paper that in enacting FISA Congress contemplated that a later legislative enactment could authorize electronic surveillance outside the procedures set forth in FISA itself, and cited the AUMF as such a legislative enactment. See Justice Department White Paper at 20-28, citing 50 U.S.C. § 1809(a)(1). ~~(TS//STLW//SI//OC/NF)~~

E. Executive Order 12333 (U)

On December 4, 1981, President Reagan signed Executive Order 12333 as part of a series of legal reforms that followed abuses of intelligence-gathering authority documented by the Church Commission in the 1970s.[14] Executive Order 12333 placed restrictions on intelligence collection activities engaged in by Executive Branch agencies, including the NSA, while also seeking to foster "full and free exchange of information" among these agencies.[15] Executive Order 12333 at 1.1. (U)

Executive Order 12333 provides that the Attorney General is authorized "to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." Id. at 2.5. Executive Order 12333 also provides that

[14] See http://www.aarclibrary.org/publib/church/reports/contents.htm. Volumes 5 and 6 of the Church Commission report address abuses of intelligence-gathering authority by the NSA and the FBI. (U)

[15] Executive Order 12333 was amended on July 30, 2008, by Executive Order 13470. This report refers to Executive Order 12333 as it existed prior to that amendment. (U)

electronic surveillance, as defined under FISA, must be conducted in accordance with FISA.[16] (U)

Executive Order 12333 prohibits the collection of foreign intelligence information by "authorized [agencies] of the Intelligence Community . . . for the purpose of acquiring information concerning the domestic activities of United States persons." Id. at 2.3(b). (U)

However, in authorizing the Stellar Wind program, [redacted] As discussed previously, the legal rationale advanced for this exemption was that the Authorization for Use of Military Force and the President's Commander-in-Chief powers gave the President the authority to collect such information, notwithstanding the FISA statute. ~~(TS//STLW//SI//OC/NF)~~

II. Presidential Authorizations (U)

The Stellar Wind program was first authorized by the President on October 4, 2001, and periodically reauthorized by the President through a series of documents issued to the Secretary of Defense entitled "Presidential Authorization for Specified Electronic Surveillance Activities During a Limited Period to Detect and Prevent Acts of Terrorism Within the United States" (Presidential Authorization or Authorization). A total of 43 Presidential Authorizations, not including modifications and related presidential memoranda, were issued over the duration of the program from October 2001 through February 2007.[17] Each Authorization directed the

[16] Prior to September 11, 2001, Executive Order 12333 and FISA were generally viewed as the principal governing authorities for conducting electronic surveillance. For example, in 2000 the NSA reported to Congress that

> (U) The applicable legal standards for the collection, retention, or dissemination of information concerning U.S. persons reflect a careful balancing between the needs of the government for such intelligence and the protection of the rights of U.S. persons, consistent with the reasonableness standard of the Fourth Amendment, as determined by factual circumstances.
>
> (U) In the Foreign Intelligence Surveillance Act (FISA) and Executive Order (E.O.) 12333, Congress and the Executive have codified this balancing. (Citations omitted.)

NSA Report to Congress, *Legal Standards for the Intelligence Community in Conducting Electronic Surveillance* (2000). (U)

[17] The Presidential Authorizations were issued on the following dates: October 4, 2001; November 2, 2001; November 30, 2001; January 9, 2002; March 14, 2002; April 18, 2002; May 22, 2002; June 24, 2002; July 30, 2002; September 10, 2002; October 15, 2002; November 18, 2002; January 8, 2003; February 7, 2003; March 17, 2003; April 22, (Cont'd.)

Secretary of Defense to [redacted] provided the surveillance met certain criteria. The specific criteria are described in detail in Chapters Three and Four of this report. ~~(TS//STLW//SI//OC/NF)~~

A. Types of Collection Authorized ~~(S//NF)~~

The scope of collection permitted under the Presidential Authorizations varied over time, but generally involved intercepting the content of certain telephone calls and e-mails, and the collection of bulk telephone and e-mail meta data. The term "meta data" has been described as "information about information." As used in the Stellar Wind program, for telephone calls, meta data generally refers to "dialing-type information" (the originating and terminating telephone numbers, and the date, time, and duration of the call), but not the content of the call. For e-mails, meta data generally refers to the "to," "from," "cc," "bcc," and "sent" lines of an e-mail, but not the "subject" line or content. ~~(TS//STLW//SI//OC/NF)~~

The information collected through the Stellar Wind program fell into three categories, often referred to as "baskets":

- Basket 1 (content of telephone and e-mail communications);
- Basket 2 (telephony meta data); and
- Basket 3 (e-mail meta data). ~~(TS//STLW//SI//OC/NF)~~

[redacted]

2003; June 11, 2003; July 14, 2003; September 10, 2003; October 15, 2003; December 9, 2003; January 14, 2004; March 11, 2004; May 5, 2004; June 23, 2004; August 9, 2004; September 17, 2004; November 17, 2004; January 11, 2005; March 1, 2005; April 19, 2005; June 14, 2005; July 26, 2005; September 10, 2005; October 26, 2005; December 13, 2005; January 27, 2006; March 21, 2006; May 16, 2006; July 6, 2006; September 6, 2006; October 24, 2006; and December 8, 2006. The last Presidential Authorization expired February 1, 2007. There were also two modifications of a Presidential Authorization and one Presidential memorandum to the Secretary of Defense issued in connection with the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

B. Findings and Primary Authorities (U)

In this section, we describe certain features common to all the Presidential Authorizations. Each of the Presidential Authorizations included a finding to the effect that terrorist groups of global reach possessed the intent and capability to attack the United States, that an extraordinary emergency continued to exist, and that these circumstances "constitute an urgent and compelling governmental interest [redacted] ~~(TS//STLW//SI//OC/NF)~~

The primary authorities cited for the legality of these electronic surveillance and related activities were Article II of the Constitution and the Authorization for Use of Military Force Joint Resolution. [redacted] ~~(TS//STLW//SI//OC/NF)~~ [redacted] The President also noted his intention to inform appropriate members of the Senate and the House of Representatives of the program "as soon as I judge that it can be done consistently with national defense needs." Some Presidential Authorizations described briefings given to members of Congress and FISA Court judges. ~~(TS//STLW//SI//OC/NF)~~

C. The Reauthorization Process (U)

The Presidential Authorizations were issued at intervals of approximately 30 to 45 days. Department officials told the OIG that the intervals were designed to be somewhat flexible to assure the availability of the principals that had to sign the Authorizations and to reassess the reasonableness of the collection.[18] Steven Bradbury, former Principal Deputy and Acting Assistant Attorney General for the Office of Legal Counsel (OLC), said that the main reason for periodically reauthorizing the program was to ensure that the Presidential Authorizations were reviewed frequently to assess the continued need for the program and the program's

[18] The officials who signed the Authorizations included the Attorney General, the President, and the Secretary of Defense (or other high-ranking Department of Defense official). (U//~~FOUO~~)

value. As the period for each Presidential Authorization drew to a close, the Director of Central Intelligence (DCI), and as of June 3, 2005, the Director of National Intelligence (DNI) prepared a threat assessment memorandum for the President describing potential terrorist threats to the United States and outlining intelligence gathered through the Stellar Wind program and other means during the previous Authorization period. The DCI (and later the DNI) and the Secretary of Defense reviewed these memoranda and signed a recommendation that the program be reauthorized.
~~(TS//STLW//SI//OC/NF)~~

Each recommendation was then reviewed by the OLC to assess whether, based on the threat assessment and information gathered from other sources, there was "a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to [continue] to authorize the warrantless searches involved" in the program. The OLC then advised the Attorney General whether the constitutional standard of reasonableness had been met and whether the Presidential Authorization could be certified "as to form and legality."
~~(TS//STLW//SI//OC/NF)~~

D. Approval "as to form and legality" (U)

As noted above, the Presidential Authorizations were "[a]pproved as to form and legality" by the Attorney General or other senior Department official, typically after the review and concurrence of the OLC. The lone exception to this practice was the March 11, 2004, Authorization which we discuss in Chapter Four. ~~(TS//SI//NF)~~

However, there was no legal requirement that the Authorizations be certified by the Attorney General or other Department official. Former senior Department official Patrick Philbin told us he thought one purpose for the certification was to give the program a sense of legitimacy so that it not "look like a rogue operation." [redacted] Bradbury told us that the Justice Department certifications served as official confirmation that the Department had determined that the activities carried out under the program were lawful.
~~(TS//STLW//SI//OC/NF)~~

Former Attorney General Gonzales told us that certification of the program as to form and legality was not required as a matter of law, but he believed that it "added value" to the Authorization for three reasons. First,

he said that the NSA was being asked to do something it had not done before, and it was important to assure the NSA that the Attorney General had approved the legality of the program. [redacted] Third, for "purely political considerations" the Attorney General's approval of the program would have value "prospectively" in the event of congressional or Inspector General reviews of the program. ~~(TS//STLW//SI//OC/NF)~~

CHAPTER THREE
INCEPTION AND EARLY OPERATION OF STELLAR WIND (SEPTEMBER 2001 THROUGH APRIL 2003) ~~(S//NF)~~

This chapter describes the early operation of the Stellar Wind program. The five sections of the chapter cover the time period from September 2001 to April 2003. ~~(S//NF)~~

In Section I, we provide a brief overview of the National Security Agency (NSA) and the inception of the Stellar Wind program, including a description of the legal authorities relied upon to support the program and the scope of collection authorized under the Presidential Authorizations. In Section II, we describe key aspects of the NSA's implementation of the Presidential Authorizations, [redacted] the technical operation of the program, and the initial process for analyzing and disseminating the information collected. In Sections III and IV, we describe the FBI's and the Office of Intelligence Policy and Review's early knowledge of and involvement in Stellar Wind. In Section V, we describe measures the FBI implemented to improve its management of information derived from the program that the FBI disseminated to its field offices. ~~(TS//STLW//SI//OC/NF)~~

I. Inception of the Stellar Wind Program (U//~~FOUO~~)

A. The National Security Agency (U)

The NSA was established on October 24, 1952, by President Truman as a separate agency within the Department of Defense under the direction, authority, and control of the Secretary of Defense. See Presidential Memorandum to the Secretary of State and the Secretary of Defense, October 24, 1952. By Executive Order 12333 (December 4, 1981), the NSA was given responsibility within the U.S. Intelligence Community for all signals intelligence, including the "collection of signals intelligence for national foreign intelligence purposes" and the processing and dissemination of such intelligence for counterintelligence purposes.[19] (U)

[19] Signals intelligence is defined as:

1. A category of intelligence comprising either individually or in combination all communications intelligence, electronic intelligence, and foreign instrumentation signals intelligence, however transmitted. (U)

2. Intelligence derived from communications, electronic, and foreign instrumentation signals. (U)

(Cont'd.)

The NSA's two primary missions are to protect U.S. government information systems and to collect, process, and disseminate foreign signals intelligence information. This twofold mission is reflected in the NSA's organizational structure, which consists of two operational directorates: The Information Assurance Directorate, which conducts defensive information operations to protect information infrastructures critical to the United States' national security interests, and the Signals Intelligence Directorate (SID), which controls foreign intelligence collection and processing activities for the United States. (U)

The SID is divided into three major components, two of which – Analysis and Production [redacted] and Data Acquisition [redacted] – are relevant to the Stellar Wind program. The work of these components with respect to the Stellar Wind program is discussed in more detail in Section II below. ~~(S//NF)~~

B. Implementation of the Program (September 2001 through November 2001) ~~(S//NF)~~

Immediately following the September 11 terrorist attacks, the NSA modified how it conducted some of its traditional signals collection activities. [redacted] ~~(TS//SI//NF)~~

George Tenet, the Director of Central Intelligence at the time, mentioned the modification of these NSA collection activities during a meeting with Vice President Cheney shortly after the September 11 attacks to discuss the intelligence community's response. According to Hayden, who did not attend the meeting but was told about it by Tenet, Cheney asked Tenet to inquire from the NSA whether there were additional steps that could be taken with respect to enhancing signals intelligence capabilities. Tenet related this message to Hayden, who responded that there was nothing further the NSA could do without additional authority. According to Hayden, Tenet asked him a short time later what the NSA could do if additional authority was provided. ~~(TS//SI//NF)~~

Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, 484. (U)

Hayden consulted with experts from the NSA's SID and attorneys from the NSA's Office of General Counsel about how the NSA could enhance its collection capabilities consistent with considerations of operational usefulness, technical feasibility, and legality. Hayden said he then attended a meeting at the White House to discuss how NSA signals intelligence collection capabilities could be modified to respond to the September 11 attacks. ~~(TS//SI//NF)~~

Hayden told us he highlighted two issues at this meeting. First, Hayden stated at the meeting that the FISA statute's applicability to evolving telecommunications technology had the effect of constraining the NSA's ability to intercept communications [redacted] According to Hayden, the NSA was authorized under Executive Order 12333 to [redacted] Thus, the NSA could not direct its traditional foreign intelligence collection activities [redacted] without having to first obtain FISA Court authorization.[21] ~~(TS//SI//NF)~~

The second issue Hayden highlighted at the meeting concerned the meta data associated with telephonic and e-mail communications. Hayden said that obtaining access to the meta data of communications to and from

[20] The FISA statute defines "wire communication" as "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." 50 U.S.C. § 1801(l). By its terms, FISA governs the acquisition of wire communications to or from persons in the United States if such acquisition occurs in the United States. See 50 U.S.C. § 1801(f)(2). [redacted] (U)

[21] [redacted]

the United States, as well as communications within the United States, would significantly enhance the NSA's analytical capabilities. ~~(TS//SI//NF)~~

Hayden said he attended two additional meetings with Vice President Cheney to discuss further how NSA collection capabilities could be expanded along the lines described at the White House meeting. Vice President Cheney directed Hayden to meet with the Counsel to the Vice President, David Addington, to continue the discussion, which Hayden said he did. According to Hayden, Addington drafted the first Presidential Authorization for the Stellar Wind program based on these meetings.[22] ~~(TS//STLW//SI//OC/NF)~~

The Stellar Wind program officially came into existence on October 4, 2001, when President Bush signed the Presidential Authorization drafted by Addington. The Authorization directed the Secretary of Defense to employ the signals intelligence capabilities of the NSA to collect certain foreign intelligence by electronic surveillance in order to prevent acts of terrorism within the United States.[23] The Presidential Authorization stated that an extraordinary emergency existed because of the September 11 attacks, constituting an urgent and compelling governmental interest permitting electronic surveillance within the United States for counterterrorism purposes without judicial warrants or court orders. ~~(TS//STLW//SI//OC/NF)~~

Access to the Stellar Wind program was very tightly restricted. Former White House Counsel and Attorney General Alberto Gonzales told the OIG that it was the President's decision to keep the program a "close hold." Gonzales stated that the President made the decision on all requests to read in non-operational persons, including Justice Department officials, and that as far as he was aware this decision-making authority had not been delegated either within the White House or to other agencies concerning read-in decisions for operational personnel, such as NSA and

[22] Hayden told us he could not recall the Justice Department having any involvement in or presence at meetings he attended to discuss enhancing NSA collection capabilities. Hayden said this mildly surprised him but that he assumed someone was keeping the Department briefed on these discussions. Gonzales, who was the White House Counsel at the time, also told the OIG that he would be "shocked" if the Department was not represented at the White House meetings, and further stated that in the immediate aftermath of September 11, he met often with lawyers from the NSA, CIA, DOD, and the Justice Department with the objective of "coordinating the legal thinking" concerning the United States' response to the attacks. Because we were unable to interview Addington, former Attorney General Ashcroft, and John Yoo, we do not know what role if any the Department played in drafting or reviewing the first Presidential Authorization. ~~(TS//SI//NF)~~

[23] The program was given the cover term [redacted] at which time the cover term was changed to "Stellar Wind." ~~(S//NF)~~

FBI employees.[24] However, as indicated in the NSA Office of the Inspector General's report on the President's Surveillance Program (NSA OIG Report), decisions to read in NSA, CIA, and FBI operational personnel were made by the NSA. According to the NSA OIG Report, NSA Director Hayden needed White House approval to read in members of Congress, FISA Court judges, the NSA Inspector General, and others. See NSA OIG Report at V. ~~(S//NF)~~

1. Pre-Stellar Wind Office of Legal Counsel Legal Memoranda (U)

In this section, we summarize the initial legal memoranda from the Justice Department supporting the legal basis for the Stellar Wind program, and we describe the key aspects of the first Presidential Authorization for the program. ~~(TS//STLW//SI//OC/NF)~~

a. Hiring of John Yoo (U)

OLC Deputy Assistant Attorney General John Yoo was responsible for drafting the first series of legal memoranda supporting the program.[25] As noted above, Yoo was the only OLC official "read into" the Stellar Wind program from the program's inception until he left the Department in May 2003.[26] The only other non-FBI Department officials read into the program until after Yoo's departure were Attorney General Ashcroft, who was read in on October 4, 2001, and Counsel for Intelligence Policy James Baker, who was read in on January 11, 2002.[27] ~~(TS//STLW//SI//OC/NF)~~

[24] Gonzales testified before the Senate Judiciary Committee on July 18, 2006, that "[a]s with all decisions that are non-operational in terms of who has access to the program, the President of the United States makes the decisions, because this is such an important program[.]" (U)

[25] The Office of Legal Counsel typically drafts memoranda for the Attorney General and the Counsel to the President, usually on matters involving significant legal issues or constitutional questions, and in response to legal questions raised by Executive Branch agencies. In addition, all Executive Orders proposed to be issued by the President are reviewed by the Office of Legal Counsel as to form and legality, as are other matters that require the President's formal approval. (U)

[26] The process of being "read into" a compartmented program generally entails being approved for access to particularly sensitive and restricted information about a classified program, receiving a briefing about the program, and formally acknowledging the briefing, usually by signing a nondisclosure agreement describing restrictions on the handling and use of information concerning the program. (U)

[27] Daniel Levin, who served as both Chief of Staff to FBI Director Robert Mueller and briefly as Ashcroft's national security counselor, also was read into the program along with Mueller in late September 2001 at the FBI. According to Levin, White House Counsel Gonzales controlled who was read into the program, but Gonzales told him that the President had to personally approve each request. ~~(TS//STLW//SI//OC/NF)~~

Jay Bybee, the Assistant Attorney General for the Office of Legal Counsel from November 2001 through March 2003, provided the OIG with background information on how Yoo came to be involved in national security issues on behalf of the OLC. Bybee's nomination to be the OLC Assistant Attorney General was announced by the White House in July 2001. Bybee was not confirmed by the Senate as the Assistant Attorney General until late October 2001.[28] For several weeks after the September 11, 2001, terrorist attacks, Bybee remained a law professor at the University of Nevada-Las Vegas, and was sworn in as OLC Assistant Attorney General in late November 2001. ~~(TS//SI//NF)~~

Bybee told us that he traveled to Washington, D.C., sometime in July 2001 to interview applicants for Deputy Assistant Attorney General slots in OLC. In early July 2001, Kyle Sampson, at the time a Special Assistant to the President and Associate Director for Presidential Personnel assigned to handle presidential appointments to the Department of Justice, told Bybee that John Yoo was already under consideration for one of the OLC Deputy Assistant Attorney General slots. Bybee said Sampson asked him whether he would agree to have Yoo be one of his deputies. Bybee said that he knew Yoo only by reputation but was "enthusiastic" about the prospect of having Yoo as a Deputy. Bybee told the OIG that he regarded Yoo as a "distinguished hire." Bybee said that after speaking with Sampson he called Yoo and asked him to work at OLC as a Deputy Assistant Attorney General. (U)

In addition to speaking with Yoo, Bybee interviewed other prospective OLC Deputies, and hired several individuals, including Patrick Philbin and Ed Whelan, for those positions.[29] The White House recommended, and Bybee agreed, that Whelan be designated Principal Deputy. Bybee stated that he knew Yoo would be disappointed because Yoo had wanted that position, and Bybee said that Yoo "didn't hide his disappointment." Bybee told us that Yoo asked him whether since he was not selected for the Principal Deputy slot he could be guaranteed the "national security portfolio." Bybee agreed to Yoo's request. Bybee told the OIG that this was an easy decision because Yoo had more national security experience than any of the other deputies. (U)

[28] Bybee told us that Daniel Koffsky was the Acting Assistant Attorney General at this time. (U)

[29] Bybee told us that all Deputy candidates were also interviewed by the White House. As described in Chapter Four of this report, Philbin played a central role in the Department's reassessment of the legal basis for the Stellar Wind program after John Yoo left the Department in May 2003. ~~(TS//SI//NF)~~

Bybee said that Yoo began working in OLC in July 2001 and that all of the Deputies were in place before Bybee began serving as head of the OLC that November. (U)

Bybee told us he was never read into the Stellar Wind program and could shed no further light on how Yoo came to draft the OLC opinions on the program. However, he said that Yoo had responsibility for supervising the drafting of opinions related to national security issues by the time the attacks of September 11 occurred.[30] Bybee described Yoo as "articulate and brilliant," and also said he had a "golden resume" and was "very well connected" with officials in the White House. He said that from these connections, in addition to Yoo's scholarship in the area of executive authority during wartime, it was not surprising that Yoo "became the White House's guy" on national security matters. (U)

b. Yoo's Legal Analysis of a Warrantless Domestic Electronic Surveillance Program ~~(TS//SI//NF)~~

Before the start of the Stellar Wind program under the October 4, 2001, Presidential Authorization, Yoo drafted a memorandum evaluating the legality of a "hypothetical" electronic surveillance program within the United States to monitor communications of potential terrorists. His memorandum, dated September 17, 2001, was addressed to Timothy Flanigan, Deputy White House Counsel, and was entitled "Constitutional Standards on Random Electronic Surveillance for Counter-Terrorism Purposes." ~~(TS//STLW//SI//OC/NF)~~

Yoo drafted a more extensive version of this memorandum, dated October 4, 2001, for White House Counsel Gonzales. [redacted] ~~(TS//SI//NF)~~

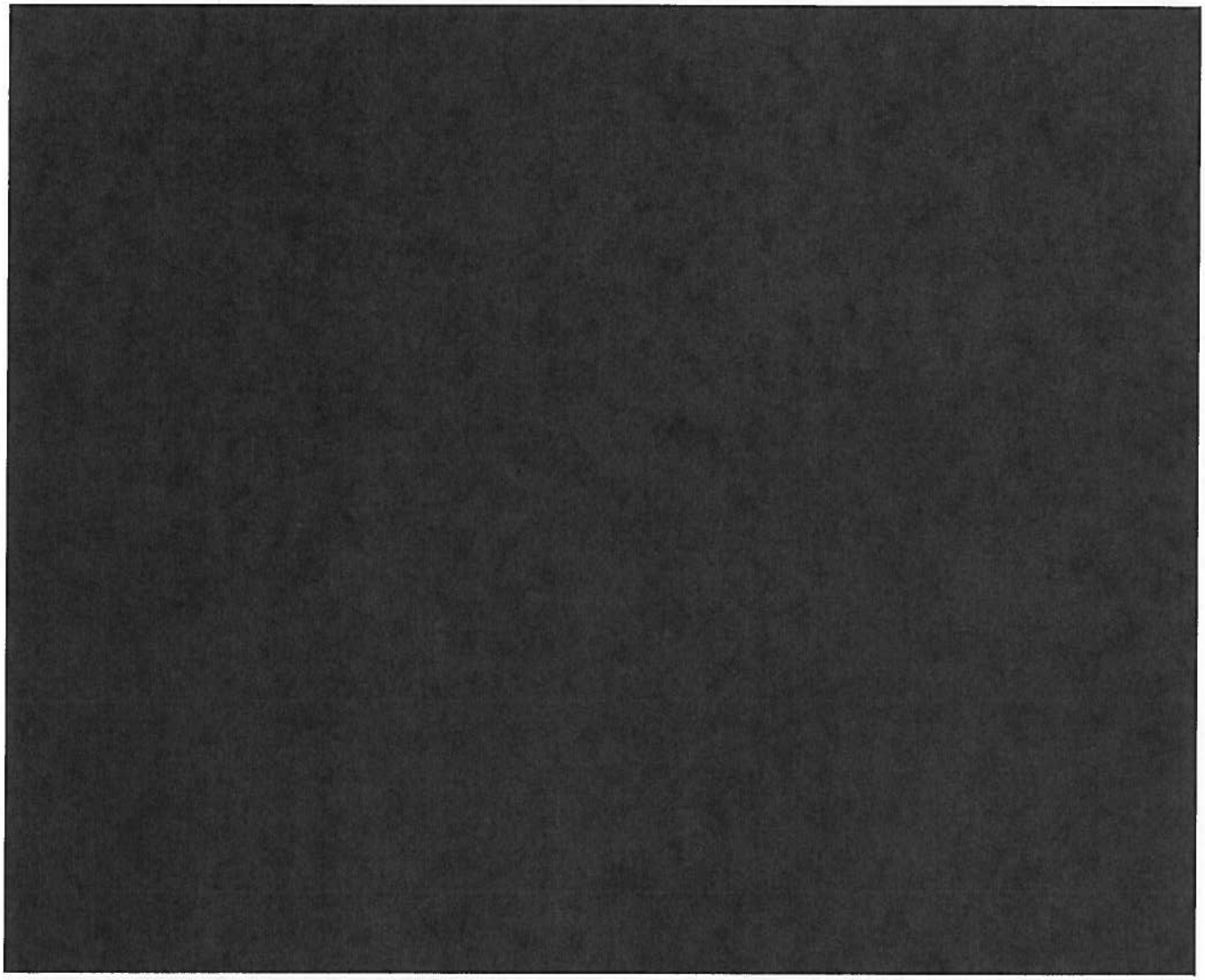
[30] As noted above, Yoo, Ashcroft, Card, and Addington declined or did not respond to our request for interviews, and we do not know how Yoo came to deal directly with the White House on legal issues surrounding the Stellar Wind program. In his book "War by Other Means," Yoo wrote that "[a]s a deputy to the assistant attorney general in charge of the office, I was a Bush Administration appointee who shared its general constitutional philosophy. . . . I had been hired specifically to supervise OLC's work on [foreign affairs and national security]." John Yoo, *War by Other Means*, (Atlantic Monthly Press, 2006), 19-20. ~~(TS//SI//NF)~~

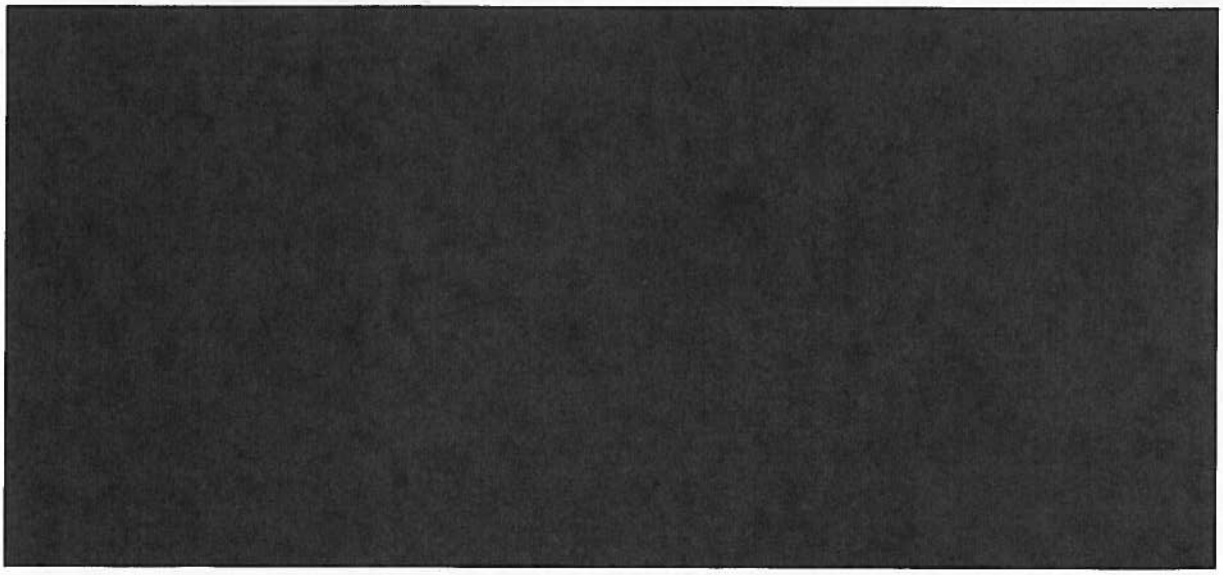
[redacted]

[31] As discussed below, however, his description of how communications would be collected and used under the program differed in key respects from the actual operation of the Stellar Wind program. In fact, in a January 23, 2006, address to the National Press Club, former NSA Director Hayden stated: ~~(TS//SI//NF)~~

> Let me talk for a few minutes also about what this program is not. It is not a drift net over Dearborn or Lackawanna or Freemont grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices that so-called experts keep talking about. (U)

[redacted]





Yoo's September 17 and October 4 memoranda were not addressed specifically to the Stellar Wind program, but rather to a "hypothetical" randomized or broadly scoped domestic warrantless surveillance program. As discussed below, the first Office of Legal Counsel opinion explicitly addressing the legality of the Stellar Wind program was not drafted until after the program had been formally authorized by President Bush on October 4, 2001. ~~(TS//SI//OC/NF)~~

Gonzales told the OIG that he did not believe these first two memoranda fully addressed the White House's understanding of the Stellar Wind program. Rather, as described above, these memoranda addressed the legality of a "hypothetical" domestic surveillance program rather than the Stellar Wind program as authorized by the President and carried out by the NSA.[35] However, Gonzales also told us that he believed these first two memoranda described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions "covered" the Stellar Wind program. ~~(TS//SI//NF)~~

2. Presidential Authorization of October 4, 2001 ~~(TS//SI//NF)~~

On October 4, 2001, President Bush issued the first of 43 Presidential Authorizations for the Stellar Wind program. The October 4 Authorization

[redacted]

[35] Gonzales noted that Deputy White House Counsel Timothy Flanigan, the recipient of the first Yoo memorandum, was not read into Stellar Wind. (U//~~FOUO~~)

In short, this first Authorization allowed NSA to intercept the content of any communication, including those to, from, or exclusively within the United States, where probable cause existed to believe one of the communicants was engaged in international terrorism, [redacted] The Authorization also allowed the NSA to "acquire" telephony and e-mail meta data where one end of the communication was foreign or neither communicant was known to be a U.S. citizen.[36] ~~(TS//STLW//SI//OC/NF)~~

The Authorization stated that it relied primarily on Article II of the Constitution and on the recently passed Authorization for the Use of Military Force (AUMF) to support the intelligence-gathering activities. The Authorization also stated that the President's directive was based on threat assessments indicating that terrorist groups remained determined to attack in the United States. The Authorization stated that it was to terminate [redacted] from the date of its execution.
~~(TS//STLW//SI//OC/NF)~~

As several Office of Legal Counsel and other Department and NSA officials acknowledged, in addition to allowing the interception of the content of communications into or out of the United States, the literal terms of paragraph 4(a)(ii) of this first Authorization would have allowed NSA to intercept the content of purely domestic communications. NSA Director Hayden told us he did not realize this until Addington specifically raised the subject during a meeting the two had to discuss renewing the first Authorization. According to Hayden, he told Addington that he did not want the NSA conducting such domestic interceptions and cited three reasons for this. First, he said the NSA was a *foreign* intelligence agency. Second, the NSA's collection infrastructure would not support the collection of purely domestic communications. Third, Hayden said he would require such a high evidentiary standard to justify intercepting purely domestic communication that such cases might just as well go to the FISA Court.[37]
~~(TS//STLW//SI//OC/NF)~~

36 [redacted]

37 Hayden said Addington did not pressure him on the subject and simply modified the next Authorization to provide that the NSA may only intercept the content of communications that originated or terminated in the United States. We discuss the modifications to the Authorization in the next part of this chapter.
~~(TS//STLW//SI//OC/NF)~~

As a result, Hayden said the NSA did not exercise the apparent authority in the first Authorization to intercept domestic-to-domestic communications. Goldsmith stated that Hayden's position that the NSA not involve itself in domestic spying related back to NSA's "getting in a lot of trouble" for its abuses during the 1970s. In addition, former Deputy Attorney General Comey told us that Hayden had said he was willing to "walk up to the line" but would be careful "not to get chalk on [his] shoes." ~~(TS//STLW//SI//OC/NF)~~

As discussed above, subsection (b) of paragraph 4 of the Authorization covered the acquisition of both e-mail and telephony meta data. The e-mail meta data included the "to," "from," "cc," "bcc," and "sent" lines of an e-mail, but not the "subject" line or content of the e-mail. [redacted] Telephony meta data acquisition included the dialing information from telephone billing data, such as the originating and terminating telephone number and the date, time, and duration of the telephone calls, but not the content of telephone calls. Under the Presidential Authorization, collection of both e-mail and telephony meta data was limited to circumstances in which one party to the communication was outside the United States or no party to the communication was known to be a U.S. citizen. ~~(TS//STLW//SI//OC/NF)~~

Attorney General Ashcroft approved the first Presidential Authorization as to "form and legality" on October 4, 2001. According to NSA records, this was the same day that Ashcroft was verbally read into the Stellar Wind program. Daniel Levin, who in October 2001 was both a national security counselor to Attorney General Ashcroft and FBI Director Mueller's Chief of Staff, told us that, according to Ashcroft, the Presidential Authorization was "pushed in front of" Ashcroft and he was told to sign it.[38] Levin stated that he was not with Ashcroft when this occurred and therefore he did not have an opportunity to advise Ashcroft about the Authorization before Ashcroft signed it. ~~(TS//STLW//SI//OC/NF)~~

James Baker, Counsel for Intelligence Policy, told us that Levin had given him the same account of how Ashcroft came to approve the October 4, 2001, Presidential Authorization. According to Baker, Ashcroft was told that the program was "critically important" and that it must be approved as to form and legality. Baker said that Levin told him Ashcroft approved the

[38] According to Hayden, Addington typed the Presidential Authorizations and personally couriered them around for signatures. However, the OIG was unable to determine whether Addington presented the first Authorization to Ashcroft for signature, because both Ashcroft and Addington declined or did not respond to our requests to interview them. ~~(S//NF)~~

Authorization on the spot. According to Baker, Levin also told Baker that when he learned there was no memorandum from the Office of Legal Counsel concerning the program, Levin told Yoo to draft one. ~~(TS//STLW//SI//OC/NF)~~

Levin's account to us of the instruction that Yoo draft a memorandum concerning the legality of the program differed slightly from Baker's account. Levin told us that he said to Ashcroft that it "wasn't fair" that Ashcroft was the only Justice official read into the program, and that for Ashcroft's protection Levin advised Ashcroft to have another Department official read into the program for the purpose of providing advice on the legality of the program. Levin said he learned that Ashcroft was able to get permission from the White House to have one other person read into the program to advise Ashcroft, although Levin was not certain how Yoo came to be selected as that person.[39] As discussed below, Gonzales told us that it was the President's decision to read John Yoo into the program. ~~(TS//STLW//SI//OC/NF)~~

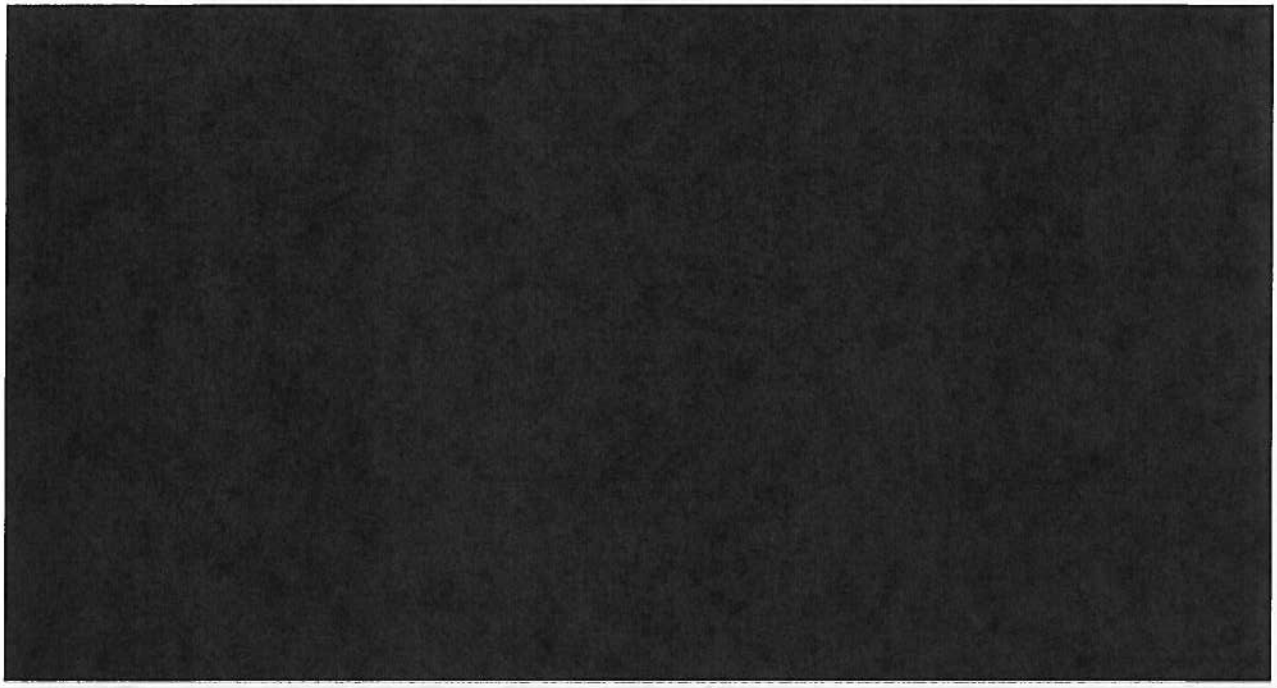
C. Presidential Authorization is Revised and the Office of Legal Counsel Issues Legal Memoranda in Support of the Program (November 2001 through January 2002) ~~(TS//STLW//SI//OC/NF)~~

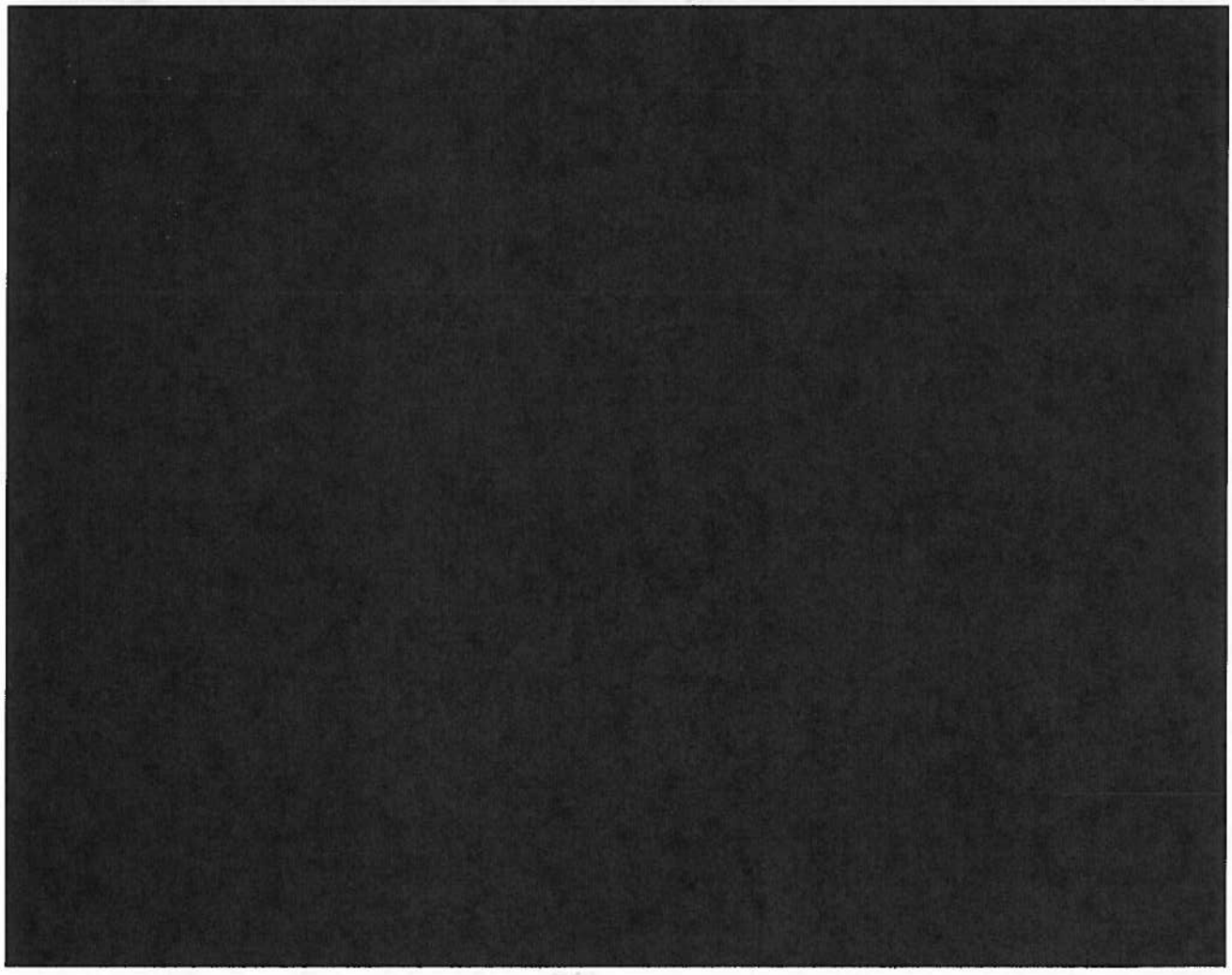
1. Presidential Authorization of November 2, 2001 ~~(TS//SI//NF)~~

On November 2, 2001, with the first Presidential Authorization set to expire, President Bush signed a second Presidential Authorization. The second Authorization relied upon the same authorities in support of the President's actions, chiefly the Article II Commander-in-Chief powers and the AUMF. The second Authorization cited the same findings in a threat assessment as to the magnitude of the potential threats and the likelihood of their occurrence in the future. [redacted]

[redacted]

[39] By October 4, 2001, Yoo had already drafted two legal analyses on a hypothetical warrantless surveillance program and therefore already had done some work related to the program prior to October 4 when Ashcroft was read in. ~~(TS//SI//NF)~~





In addition, former OLC Principal Deputy and Acting Assistant Attorney General Steven Bradbury described this [redacted] ~~(TS//STLW//SI//OC/NF)~~

2. Yoo Drafts Office of Legal Counsel Memorandum Addressing Legality of Stellar Wind ~~(TS//STLW//SI//OC/NF)~~

The Stellar Wind program was first authorized by President Bush and certified as to form and legality by Attorney General Ashcroft on October 4, 2001, without the support of any formal legal opinion from the Office of Legal Counsel expressly addressing Stellar Wind. ~~(TS//SI//NF)~~

The first OLC opinion directly supporting the legality of the Stellar Wind program was dated November 2, 2001, and was drafted by Yoo. His opinion also analyzed the legality of the first Presidential Authorization and a draft version of the second Authorization.[40] ~~(TS//SI//NF)~~

In his November 2 memorandum to Attorney General Ashcroft, Yoo opined that the Stellar Wind program [redacted] As discussed in Chapter Four of this report, however, perceived deficiencies in Yoo's memorandum later became critical to the Office of Legal Counsel's decision to reassess the Stellar Wind program in 2003. We therefore describe Yoo's legal analysis in his November 2 memorandum. ~~(TS//SI//NF)~~

Yoo acknowledged at the outset of his November 2 memorandum that "[b]ecause of the highly sensitive nature of this subject and the time pressures involved, this memorandum has not undergone the usual editing and review process for opinions that issue from our Office [OLC]." The memorandum then reviewed the changes to NSA's collection authority between the first and second Presidential Authorizations. [redacted]

[40] The second Authorization was issued on November 2, 2001. In developing his legal memorandum, Yoo analyzed a draft of the second Authorization dated October 31, 2001. The OIG was not provided the October 31 draft Presidential Authorization, but based on Yoo's description in his November 2 memorandum, it appears that the draft that Yoo analyzed tracked the language of the final November 2, 2001, Authorization signed by the President. ~~(TS//SI//NF)~~

[redacted]

~~(TS//STLW//SI//OC/NF)~~

[redacted]

Yoo did acknowledge in his memorandum that the first Presidential Authorization was "in tension with FISA." Yoo stated that FISA "purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence," but Yoo then opined that "[s]uch a reading of FISA would be an unconstitutional infringement on the President's Article II authorities."[41] Citing advice of the OLC and the position of the Department as presented to Congress during passage of the USA PATRIOT Act several weeks earlier, Yoo characterized FISA as merely providing a "safe harbor for electronic surveillance," adding that it "cannot restrict the President's ability to engage in warrantless searches that protect the national security." ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[41] As discussed in Chapter Four, Goldsmith criticized this statement as conclusory and unsupported by any separation of powers analysis. (U//~~FOUO~~)

Regarding whether the activities conducted under the Stellar Wind program could be conducted under FISA, Yoo wrote that it was problematic that FISA required an application to the FISA Court to describe the [redacted] or "facilities" to be used by the target of the surveillance. Yoo also stated that it was unlikely that a FISA Court would grant a warrant to cover [redacted] as contemplated in the Presidential Authorization. Noting that the Authorization could be viewed as a violation of FISA's civil and criminal sanctions in 50 U.S.C. §§ 1809-10, Yoo opined that in this regard FISA represented an unconstitutional infringement on the President's Article II powers. According to Yoo, the ultimate test of whether the government may engage in warrantless electronic surveillance activities is whether such conduct is consistent with the Fourth Amendment, not whether it meets the standards of FISA. ~~(TS//STLW//SI//OC/NF)~~

Citing cases applying the doctrine of constitutional avoidance, Yoo reasoned that reading FISA to restrict the President's inherent authority to conduct foreign intelligence surveillance would raise grave constitutional questions.[42] Yoo wrote that "unless Congress made a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless searches in the national security area – which it has not – then the statute must be construed to avoid such a reading."[43] ~~(TS//STLW//SI//OC/NF)~~

[42] Yoo's memorandum cited the doctrine of constitutional avoidance, which holds that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Yoo cited cases supporting the application of this doctrine in a manner that preserves the President's "inherent constitutional power, so as to avoid potential constitutional problems." See, e.g., *Public Citizen v, Department of Justice*, 491 U.S. 440, 466 (1989). ~~(TS//STLW//SI//OC/NF)~~

[43] On March 2, 2009, the Justice Department released nine opinions written by the OLC from 2001 through 2003 regarding "the allocation of authorities between the President and Congress in matters of war and national security" containing certain propositions that no longer reflect the views of the OLC and "should not be treated as authoritative for any purpose." Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, Memorandum for the Files, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," January 15, 2009, 1, 11. Among these opinions was a February 2002 classified memorandum written by Yoo which asserted that Congress had not included a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area and that the FISA statute therefore does not apply to the president's exercise of his Commander-in-Chief authority. In a January 15, 2009, memorandum (included among those released in March), Bradbury stated that this proposition "is problematic and questionable, given FISA's express references to the President's authority" and is "not supported by convincing reasoning." ~~(TS/STLW//SI//OC/NF)~~

Yoo's analysis of this point would later raise serious concerns for other officials in the Office of Legal Counsel and the Office of the Deputy Attorney General (ODAG) in late 2003 and early 2004.[44] Among other concerns, Yoo did not address the 15-day warrant requirement exception in FISA following a congressional declaration of war. See 50 U.S.C. § 1811. Yoo's successors in the Office of Legal Counsel criticized this omission in Yoo's memorandum because they believed that by including this provision in FISA, Congress arguably had demonstrated an intention to "occupy the field" on the matter of electronic surveillance during wartime.[45] ~~(TS//STLW//SI//OC/NF)~~

Yoo's memorandum next analyzed Fourth Amendment issues raised by the Presidential Authorizations. Yoo dismissed Fourth Amendment concerns regarding the NSA surveillance program to the extent that the Authorizations applied to non-U.S. persons outside the United States. Regarding those aspects of the program that involved interception of the international communications of U.S. persons in the United States, Yoo asserted that Fourth Amendment jurisprudence allowed for searches of persons crossing the border and that interceptions of communications in or out of the United States fell within the "border crossing exception." Yoo further opined that electronic surveillance in "direct support of military operations" did not trigger constitutional rights against illegal searches and seizures, in part because the Fourth Amendment is primarily aimed at curbing law enforcement abuses. ~~(TS//STLW//SI//OC/NF)~~

Finally, Yoo wrote that the electronic surveillance described in the Presidential Authorizations was "reasonable" under the Fourth Amendment and therefore did not require a warrant. In support of this position, Yoo cited Supreme Court opinions upholding warrantless searches in a variety of contexts, such as drug testing of employees and sobriety checkpoints to detect drunk drivers, and in other circumstances "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable," *Veronia School Dist. 47J v. Acton*, 515 U.S. 464, 652 (1995) (as quoted in November 2, 2001, Memorandum at 20). Yoo wrote that in these situations the government's interest was found to have outweighed the individual's privacy interest, and that in this regard "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 435 U.S. 280, 307 (1981). According

[44] One of these officials was Patrick Philbin, who following Yoo's departure was "dual-hatted" as both an Associate Deputy Attorney General and a Deputy Assistant Attorney General in the Office of Legal Counsel. (U)

[45] We discuss the OLC's reassessment and criticism of Yoo's analysis in Chapter Four. (U)

to Yoo, the surveillance authorized by the Presidential Authorizations advanced this governmental security interest. ~~(TS//STLW//SI//OC/NF)~~

Yoo's memorandum focused almost exclusively on content interceptions. [redacted] ~~(TS//STLW//SI//OC/NF)~~ [redacted]

Yoo also omitted from his November 2 memorandum – as well as from his earlier September 17 and October 4, 2001, memoranda – any discussion of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a leading case on the distribution of government powers between the Executive and

[redacted]

46 [redacted]

Legislative branches.[47] As discussed in Chapter Four, Justice Jackson's analysis of President Truman's Article II Commander-in-Chief authority during wartime in the *Youngstown* case was an important factor in the Office of Legal Counsel's reevaluation in 2004 of Yoo's opinion on the legality of the Stellar Wind program. ~~(TS//SI//NF)~~

3. Additional Presidential Authorizations (U)

On November 30, 2001, the President signed a third Authorization authorizing the Stellar Wind program. The third Authorization was virtually identical to the second Authorization of November 2, 2001, in finding that the threat of terrorist attacks in the United States continued to exist, the legal authorities cited for continuing the electronic surveillance, and the scope of collection. ~~(TS//STLW//SI//OC/NF)~~

OLC Principal Deputy and Acting Assistant Attorney General Bradbury told the OIG that [redacted] Accordingly, the fourth Presidential Authorization, signed on January 9, 2002, modified the scope of collection to provide:

[redacted]

[47] In *Youngstown*, the Supreme Court held that President Truman's Executive Order directing the Secretary of Commerce to seize and operate steel plants during a labor dispute to produce steel needed for American troops during the Korean War was an unconstitutional exercise of the President's Article II Commander-in-Chief authority. In a concurring opinion, Justice Jackson listed three categories of Presidential actions against which to judge the Presidential powers. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum[.]" Id. at 635. Second, Justice Jackson described a category of concurrent authority between the President and Congress as a "zone of twilight" in which the distribution of power is uncertain and dependant on "the imperatives of events and contemporary imponderables rather than on abstract theories of law." Id. at 637 (footnote omitted). Third, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. Justice Jackson concluded that President Truman's actions fell within this third category, and thus "under circumstances which leave Presidential power most vulnerable to attack and in the least favorable of possible constitutional postures." Id. at 640. (U)

[redacted]

Presidential Authorization, January 9, 2002. ~~(TS//STLW//SI//OC/NF)~~

[redacted] The language of the Authorization as modified in January 2002 remained the collection standard in subsequent Presidential Authorizations extending the Stellar Wind Program, until the disputed Presidential Authorization in March 2004, which we discuss in Chapter Four. ~~(TS//STLW//SI//OC/NF)~~

4. Subsequent Yoo Opinions (U)

In a 2-page memorandum to Attorney General Ashcroft dated January 9, 2002, Yoo wrote that [redacted] did not affect the legality of the Authorization. ~~(TS//STLW//SI//OC/NF)~~

Several identical Presidential Authorizations recertifying the Stellar Wind program were signed in 2002. (U//~~FOUO~~)

In October 2002, at Attorney General Ashcroft's request, Yoo drafted another opinion for Ashcroft concerning the Stellar Wind program. This memorandum, dated October 11, 2002, reiterated the same basic analysis in Yoo's November 2, 2001, memorandum in support of the legality of the Stellar Wind program.[48] [redacted]

[48] As in the November 2, 2001, memorandum, Yoo's October 11, 2002, memorandum included the following caveat: "Because of the highly sensitive nature of this subject and its level of classification, this memorandum has not undergone the usual editing and review process for opinions that issue from our Office [OLC]." ~~(TS//STLW//SI//OC/NF)~~

[redacted]

~~(TS//STLW//SI//OC/NF)~~

[redacted]

5. Yoo's Communications with the White House (U)

As the only Office of Legal Counsel official who had been read into the Stellar Wind program through early 2003, Yoo consulted directly with White House officials about the program during this period. Because we were unable to interview Yoo, we could not determine the exact nature and extent of these consultations. We were also unable to determine whether Ashcroft was fully aware of the advice Yoo was providing directly to the White House about the program. ~~(S//NF)~~

Gonzales told the OIG that Yoo was among those with whom the White House consulted to develop advice for the President on the program, but he asserted that Yoo was not sought out to provide approval of the program for the Department. However, Gonzales told us that he did not know how Yoo came to be the primary Justice Department official that the White House consulted during this period about the program. ~~(S//NF)~~

In fact, Jay Bybee, who served as the OLC Assistant Attorney General for most of this period and was Yoo's supervisor, was never read into the Stellar Wind program. Bybee told the OIG that during his tenure as Assistant Attorney General he did not know that Yoo was working alone on a sensitive compartmented program and he had no knowledge of how Yoo

came to be selected for this responsibility. Bybee told us that he was "surprised" and "a little disappointed" to learn in media accounts that he was not privy to Yoo's work on what Bybee had later learned to be a compartmented counterterrorism program involving warrantless electronic surveillance. Bybee said that it would not be unusual for a Deputy Assistant Attorney General such as Yoo to have direct contact with the White House for the purpose of rendering legal advice, but that the OLC Assistant Attorney General must be aware of all opinions that issue from the OLC. Bybee said that the Assistant Attorney General has an obligation to "see the whole picture" and is the person in the office who knows the full range of issues that are being addressed by the OLC and who can assure that OLC opinions remain consistent. ~~(TS//SI//NF)~~

6. Gonzales's View of the Department's Role in Authorizing the Stellar Wind Program ~~(S//NF)~~

The OIG asked Gonzales about how he, as White House Counsel, viewed the role of the Justice Department during the early phase of the Stellar Wind program. Gonzales stated that he and others at the White House tried to be very careful to understand what could be done legally, and they wanted to have "constant communications with the Department" in the first few months following the September 11, 2001, terrorist attacks. Gonzales also stated that it was the President, and not the Attorney General or the White House Counsel, who authorized the warrantless surveillance activity under the Stellar Wind program. However, Gonzales acknowledged that the President's decision was based on advice from the Attorney General and White House Counsel, among others. ~~(TS//SI//NF)~~

The OIG also asked whether Gonzales had a personal belief about the justification for having a single attorney – Yoo – speak on behalf of the Department regarding the legality of the program. Gonzales stated that it was up to the Attorney General to make that determination or calculation. Gonzales stated that he understood the Department's position was that the program was legal and that Yoo would sit down with Attorney General Ashcroft to answer any legal questions when the Presidential Authorizations were presented to Ashcroft for his signature. Gonzales said he understood that the Yoo opinions represented the legal opinion of the Department. However, as noted previously, for the first year and a half of the program the Department read-ins included only Yoo, Ashcroft, and Baker. ~~(TS//SI//NF)~~

Gonzales also stated that it was Ashcroft's decision as to how to satisfy his legal obligations as Attorney General. However, when the OIG asked whether Gonzales was aware if Ashcroft ever requested to have additional people read into Stellar Wind, Gonzales stated that he recalled Ashcroft wanted Deputy Attorney General Larry Thompson and his Chief of Staff, David Ayres, read in. Gonzales acknowledged that neither official was

ever read into the program. Gonzales said that Ashcroft complained that it was "inconvenient" not to have Thompson and Ayres read in, but Gonzales also stated that he never got the sense from Ashcroft that it affected the quality of the legal advice the Department provided to the White House. Gonzales stated that other than Ashcroft's request that Thompson and Ayres be read in, he did not recall Ashcroft requesting to have additional Department officials read in.[49] ~~(S//NF)~~

II. NSA's Implementation of the Stellar Wind Program (U//~~FOUO~~)

In this section, we describe the NSA's initial implementation of the Stellar Wind program. We first describe how the NSA acquired the communications data authorized for collection under the program. We also discuss the process the NSA used to analyze the information received from the Stellar Wind program and how this information was provided to the FBI. (U//~~FOUO~~)

A. Implementation of Stellar Wind (U//~~FOUO~~)

Our description of the implementation of the Stellar Wind program is based on NSA and Justice Department documents we obtained during our review, as well as interviews of NSA and Department personnel with knowledge of Stellar Wind's technical operation. This section provides a basic overview of how the NSA obtained [redacted] the information authorized for collection under Stellar Wind. This information is also important for later sections of this report that describe significant modifications to the Authorizations regarding the manner and scope of collection, the Department's re-assessment of the legal rationale supporting the Stellar Wind program during late 2003 and early 2004, and compliance issues that arose when the Department decided to seek collection of [redacted] ~~(TS//STLW//SI//OC/NF)~~ [redacted]

[49] Gonzales stated that Ashcroft, as the Attorney General, would be well-positioned to request the President to allow additional attorneys to be read into the program. Drawing on his own experience as Attorney General, Gonzales cited his request to the President in 2006 that the then head of the Office of Professional Responsibility (OPR) and several attorneys within OPR be granted security clearances in order to conduct an inquiry into the professional conduct of Department lawyers with respect to the Stellar Wind program. Gonzales said he made his request both through White House Counsel Harriet Miers and directly to the President. However, the President initially declined the request, and the request was not granted until October 2007. (U//~~FOUO~~)

[redacted]

[redacted] As discussed previously, the NSA collected three categories of information under Stellar Wind that came to be commonly referred to as the three "baskets." Basket 1 referred to collection of the content of telephone and e-mail communications; basket 2 referred to collection of meta data associated with telephone communications; and basket 3 referred to collection of meta data associated with e-mail and other Internet communications. [redacted]

[redacted].[52] ~~(TS//STLW//SI//OC/NF)~~

[50] [redacted]

[51] We describe in Chapter Four changes made in March and [redacted] 2004 [redacted] under Presidential Authorization following a dispute between the White House and Justice Department concerning the legality of the Stellar Wind program. [redacted] ~~(TS//SI//NF)~~

[52] Title 18 of the United States Code generally prohibits the interception and disclosure of wire, oral, or electronic communications, and provides for criminal penalties for any person engaging in such activity. See 18 U.S.C. § 2511. [redacted]

[redacted]

The meta data collected [redacted] under Stellar Wind (baskets 2 and 3), as well as the meta data associated with communications targeted for content collection under the program, was placed into an NSA database system called [redacted] which according to NSA officials is a configuration of databases and analytical tools. [redacted] databases are segregated into "realms" organized by the specific authority allowing the particular data to be collected.[53] The content data collected under the Stellar Wind program was placed in a separate NSA repository.[54] ~~(TS//STLW//SI//OC/NF)~~

1. Basket 1 – Telephone and E-Mail Content Collection ~~(TS//STLW//SI//OC/NF)~~

a. Telephone Communications (U)

In this section we describe briefly the technical means used by the NSA to access the international telephone system to accomplish the collection of international calls under the Stellar Wind program.[55] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

(U)

[redacted]

[53] NSA officials said the realms also establish a system of access control to ensure that only authorized users access certain data. ~~(S//NF)~~

[54] As discussed in Chapter Five of this report, the NSA created an additional realm in July 2004 when the government obtained FISA authority to collect e-mail meta data, and another realm in May 2006 when it obtained authority under FISA to collect telephony meta data. These realms were separate from the realms that contained information collected under Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

[55] The NSA's interception of international telephone communications under Stellar Wind highlighted the dramatic change in telecommunications technology that had been taking place for nearly 20 years. In 1978, when FISA was enacted, telephone calls placed by and to individuals within the United States (domestic calls) were carried mostly on copper wires, while telephone calls placed to or from individuals outside the United States (international calls) generally were transmitted by satellites. FISA reflected the state of technology then by defining the term "electronic surveillance" to be the acquisition of the contents of certain wire and radio (satellite) communications. FISA stated that as to radio

(Cont'd.)

[redacted]

communications specifically, and thus as to most international communications, the interception of calls constituted "electronic surveillance" only if the acquisition intentionally targeted a particular known U.S. person in the United States, or if all participants to the communication were located in the United States. See 50 U.S.C. §§ 1801(f)(1) and (3). Accordingly, government surveillance that targeted foreign persons outside the United States generally was not considered electronic surveillance under FISA, and the government was not required to obtain a FISA Court order authorizing the surveillance even if one of the parties to the communication was in the United States.
~~(TS//STLW//SI//OC/NF)~~

[redacted]

56 [redacted]

[redacted]

b. E-Mail Communications ~~(TS//SI//NF)~~

[redacted]

57

[redacted]

[redacted]

[redacted] However, under the October 4, 2001, Presidential Authorization, the NSA for the first time was authorized to intercept international e-mails originating or terminating inside the United States. [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[redacted]

[redacted]

[redacted]

2. Basket 2 – Telephony Meta Data Collection ~~(TS//STLW//SI//OC/NF)~~

[redacted]

60 [redacted]

The NSA informed the FISA Court of this issue in the government's December 2006 FISA application that sought to bring Stellar Wind's content collection under FISA authority (discussed in Chapter Five of this report). [redacted]

~~(TS//STLW//SI//OC/NF)~~

[redacted] These records, also referred to as call detail records, consist of routing information that includes the originating and terminating telephone number of each call, and the date, time, and duration of each call. The call detail records do not include the substantive content of any communication or the name, address, or financial information of a subscriber or customer. ~~(TS//STLW//SI//OC/NF)~~

As discussed above, the initial Presidential Authorizations [redacted] that is, call detail records pertaining to communications where at least one party was outside the United States, where no party was known to be a United States citizen, or where there was reasonable articulable suspicion to believe the communication related to international terrorism. As noted in Chapter One, the NSA interpreted this authority to also permit it to collect telephony and e-mail meta data in bulk so that it would have a database from which to acquire the targeted meta data. [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

61 [redacted]

62 [redacted]

(Cont'd.)

[redacted]

[redacted] The NSA personnel also organized the data into a format that could be used by NSA analysts responsible for analyzing the information under the Stellar Wind program. The data was archived into an NSA analytical database that contained exclusively Stellar Wind information and that was accessible only by specially authorized NSA personnel read into the program. ~~(TS//STLW//SI//OC/NF)~~

[redacted][63] While the magnitude of the bulk collection was enormous, the NSA did not retrieve or review most of this data because access was authorized only with respect to telephone communications that satisfied the Presidential Authorizations "acquisition" standard. In fact, the NSA reported that by the end of 2006, .001% of the data collected had actually been retrieved from its database for analysis. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[63] We describe these techniques in part B of this section. (U)

3. Basket 3 – E-Mail Meta Data Collection
~~(TS//STLW//SI//OC/NF)~~

[redacted]

The meta data the NSA obtained from e-mail communications included the information that appeared on the "to," "from," "cc," "bcc," and "sent" lines of a standard e-mail. Thus, the NSA collected the e-mail address of the sender, the e-mail addresses of any recipients, and the information concerning the date and time when the e-mail was sent.
~~(TS//STLW//SI//OC/NF)~~

[redacted] The meta data collection did not include information from the "subject" or "re" lines of the e-mails or the body of the e-mails.[64]
~~(TS//STLW//SI//OC/NF)~~

64 [redacted]

[redacted] ~~(TS//STLW//SI//OC/NF)~~

B. NSA Process for Analyzing Information Collected Under Stellar Wind ~~(S//NF)~~

The NSA conducted two functionally distinct types of review of the massive amount of data it collected under the Stellar Wind program. First, the NSA conducted procedures intended to ensure that it only reviewed or "acquired" the information that was within the scope of the Presidential Authorizations. Second, the NSA conducted substantive analysis of the acquired information to determine whether it had intelligence value that should be disseminated to customer agencies such as the FBI and the CIA. ~~(TS//SI//NF)~~

The NSA procedures to ensure that the acquisition and dissemination standards were satisfied became more formalized over time. We describe below how the NSA handled the enormous volume of data it was collecting with the Stellar Wind program. ~~(TS//SI//NF)~~

1. Basket 1: Content tasking, Analysis, and Dissemination ~~(TS//STLW//SI//OC/NF)~~

Stellar Wind's "basket 1" content database contains telephone and e-mail communications of individuals. The NSA refers to the telephone numbers and e-mail addresses tasked for interception as "selectors." To task a selector under the Presidential Authorizations, the NSA was required to establish probable cause to believe the intercepted communications originated or terminated outside the United States and probable cause to believe a party to the communications was a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group.[65] ~~(TS//STLW//SI//OC/NF)~~

The NSA had two processes for tasking selectors under Stellar Wind. One process applied to tasking foreign selectors, or selectors believed to be

[65] [redacted]

used by non-U.S. persons outside the United States. The other process applied to tasking domestic selectors, or selectors believed to be used by persons inside the United States or by U.S. persons abroad. A foreign selector could be tasked for collection under Stellar Wind based upon an NSA analyst's determination, following some amount of documented research and analysis about the selector, that the terms of the Authorizations were satisfied. The NSA did not require any additional levels of approval before a foreign selector could be tasked.[66]
~~(TS//STLW//SI//OC/NF)~~

A domestic selector could be tasked only after the NSA analyst obtained specific approvals. The rigor of the process to task a domestic selector evolved over time, but essentially it required an analyst to draft a formal tasking package that demonstrated, through analysis and documentation, that the selector satisfied the terms of the Authorizations. This package was reviewed by a designated senior official who could approve or reject the package, or request that additional information be provided.
~~(TS//STLW//SI//OC/NF)~~

In emergency situations, the NSA could commence content interception on a selector within [redacted] of identifying a number or address that satisfied the criteria in the Presidential Authorizations. In other cases, interception commenced within [redacted] for urgent or priority taskings and within a week for routine taskings. ~~(TS//STLW//SI//OC/NF)~~

The NSA conducted 15-, 30-, and 90-day reviews of tasked foreign and domestic selectors to assess whether the interception should continue. The NSA stated that the selectors were "de-tasked" if the user was arrested, if probable cause could no longer be established, or if other targets took priority. ~~(TS//STLW//SI//OC/NF)~~

The content intercepted under taskings was sent to the NSA and placed in a database accessible by NSA analysts cleared into the Stellar Wind program. The analysts were responsible for reviewing the communications and assessing whether a Stellar Wind report should be generated for the FBI and the CIA. [redacted]

[redacted]

[redacted]

~~(TS//STLW//SI//OC/NF)~~

2. Baskets 2 and 3: Telephony and E-Mail Meta Data Queries, Analysis, and Dissemination ~~(TS//STLW//SI//OC/NF)~~

The NSA received [redacted] a massive amount of telephony and e-mail meta data (basket 2 and 3 information) that was stored in a realm accessible only by NSA analysts assigned to the Stellar Wind program. The purpose of the collection was to facilitate the identification of connections [redacted] among particular telephone numbers and e-mail addresses by using [redacted] sophisticated analytical techniques called "contact chaining" [redacted] ~~(TS//STLW//SI//OC/NF)~~

As described by the NSA in declarations filed with the FISA Court, contact chaining is used to determine the contacts made by a particular telephone number or e-mail address (tier one contacts), as well as contacts made by subsequent contacts (tier two and tier three contacts). The NSA uses computer algorithms to identify the first two tiers of contacts an e-mail address makes and the first three tiers of contacts a telephone number makes. According to the NSA, multi-tiered contact analysis is particularly useful with telephony meta data because a telephone does not lend itself to simultaneous contact with large numbers of individuals as e-mail does with spam. [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

As previously noted, the NSA interpreted the Presidential Authorizations to permit it to collect telephony and e-mail meta data in bulk.[67] The NSA "queried" the databases that held this data to identify meta data for communications to or from a particular telephone or e-mail address (the "selector," also known as the "seed number" or "seed account"). NSA analysts queried the database using a selector for which there was a reasonable articulable suspicion to believe that the number or account had been used for communications related to international terrorism.[68] [redacted]

[redacted]

~~(TS//STLW//SI//OC/NF)~~

[redacted]

As with proposals to task selectors, an NSA shift coordinator typically reviewed for approval proposals to query either the e-mail or telephony meta data bulk databases using particular selectors. If the shift coordinator agreed that the reasonable articulable suspicion standard was met, the selector was approved and the analyst was authorized to query the meta data bulk database to identify all of the other telephone numbers or e-mail addresses that had been in contact with the seed account. Each contact along the chain of contacts that originated with the selector was referred to as a "hop," meaning that a telephone call from the seed account to telephone number A was considered "one hop out," and a call from telephone number A to telephone number B was considered "two hops out" (relative to the seed account), and so on. NSA analysts used specialized software to chain and analyze the contacts identified by each query. The

67 [redacted]

68 [redacted]

NSA told us that Stellar Wind analysts were permitted to chain the results of queries up to three hops out from the selector. ~~(TS//STLW//SI//OC/NF)~~

The results of each query were analyzed to determine whether any of the contacts should be reported, or "tipped," to Stellar Wind customers – primarily the FBI, CIA, and the National Counterterrorism Center. In the first months of the Stellar Wind program, the NSA reported to the FBI most contacts identified between a U.S. telephone number or e-mail address and the selector used to query the meta data realm, as well as domestic contacts that were two and three hops out from a selector. As discussed in Chapter Six of this report, over time the NSA and FBI worked to improve the reporting process and the quality of the intelligence being disseminated under Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

The domestic contacts from specified numbers or e-mail addresses, called "tippers," were provided to the FBI by the NSA. These tippers were included in reports that contained two sections separated by a dashed line, commonly referred to as a "tearline," made to appear as a perforation extending across the width of a page. The purpose of the tearline was to separate the compartmented information above the tearline, which could identify the specific sources and methods used to obtain the information, from the non-compartmented information that the FBI could further disseminate to its field offices. Only FBI personnel read into the Stellar Wind program could have access to the full Stellar Wind reports from NSA. ~~(TS//STLW//SI//OC/NF)~~

The information that appeared above the tearline typically was classified Top Secret/SCI and identified Stellar Wind as the source of the intelligence. The information included specific details [redacted] as well as any pertinent comments by NSA intelligence analysts. ~~(TS//STLW//SI//OC/NF)~~

The information that appeared below the tearline of a report generally was classified Secret or Confidential and did not identify Stellar Wind as the source of the intelligence. The text typically included some version of the following statement:

[redacted]

The amount of information about the contacts that followed this statement varied. [redacted]

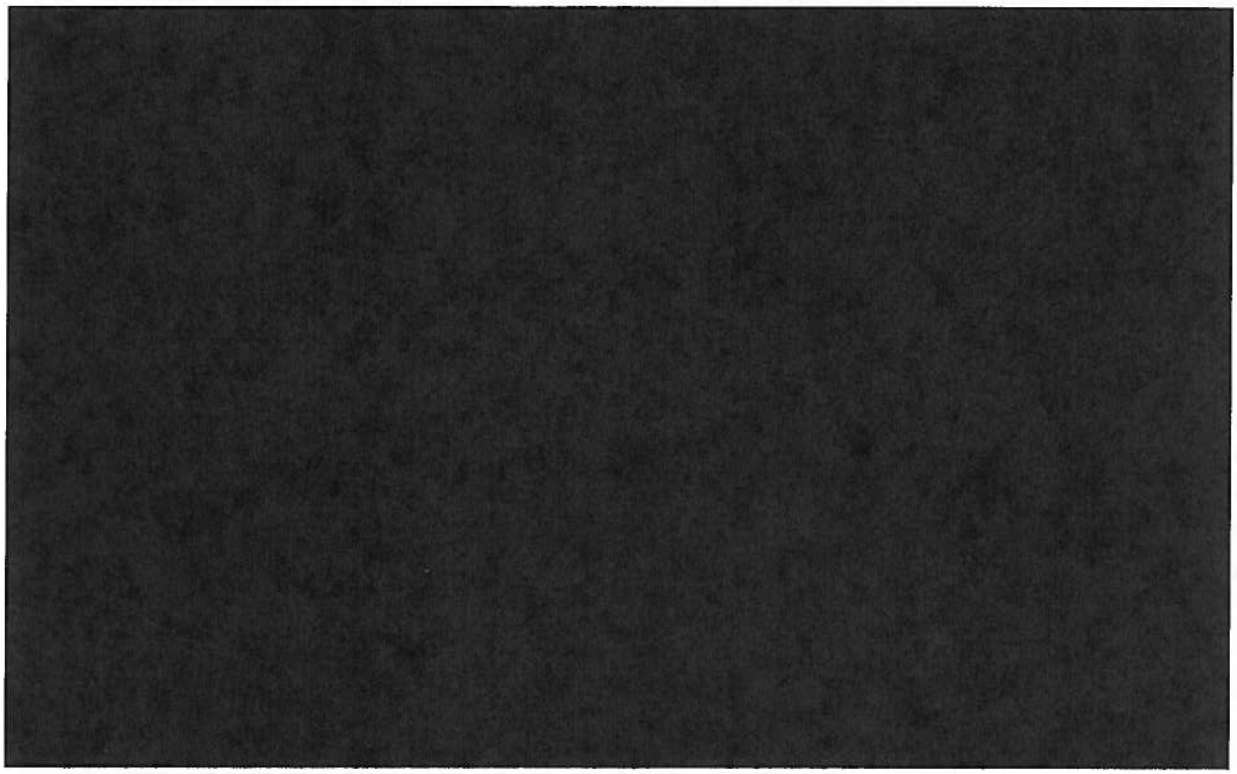
[redacted] and provided the date or dates of the contacts, or the period of time in which contact was made. ~~(TS//STLW//SI//OC/NF)~~

During the first several months of the Stellar Wind program, nearly all reports based on telephone or e-mail meta data analysis designated each of the tippers as [redacted]

~~(TS//STLW//SI//OC/NF)~~

As examples, the following Stellar Wind reports were among those disseminated to the FBI in November 2001. We have excerpted only the information below the tearline, which is often referred to simply as "tearline information." In addition, we did not provide the actual telephone numbers provided by the NSA to the FBI. ~~(TS//SI//NF)~~

[redacted]



III. FBI's Early Participation in the Stellar Wind Program ~~(S//NF)~~

Stellar Wind was not an FBI program, nor was the FBI involved in the program's creation. However, as the lead agency for counterterrorism in the United States, the FBI received much intelligence produced under Stellar Wind. In the following sections, we describe how the FBI became involved in the Stellar Wind program, the personnel resources allocated to handle Stellar Wind information, and the initial procedures the FBI established to receive, control, and disseminate the program information. ~~(TS//STLW//SI//OC/NF)~~

[69] In addition to the queries the NSA conducted on a case-by-case basis, the NSA also maintained a list of foreign and domestic telephone numbers and e-mail addresses for which, based on NSA analysts' assessments, there was a reasonable basis to believe were associated with international terrorism. These selectors, called "alerts," were queried against the incoming meta data automatically on a daily basis, and any contacts with a domestic telephone number or e-mail address were directed to NSA analysts for review and possible reporting to the FBI. The NSA regularly updated the alert list by adding or removing selectors, depending on the available intelligence. As we discuss in Chapter Five in connection with the transition of Stellar Wind's bulk meta data collection from presidential authority to FISA authority, the FISA Court found that the NSA's use of the alert list to query incoming telephone meta data did not comply with terms of the Court's Order. ~~(TS//STLW//SI//OC/NF)~~

A. FBI Director First Informed of Stellar Wind Program (U//~~FOUO~~)

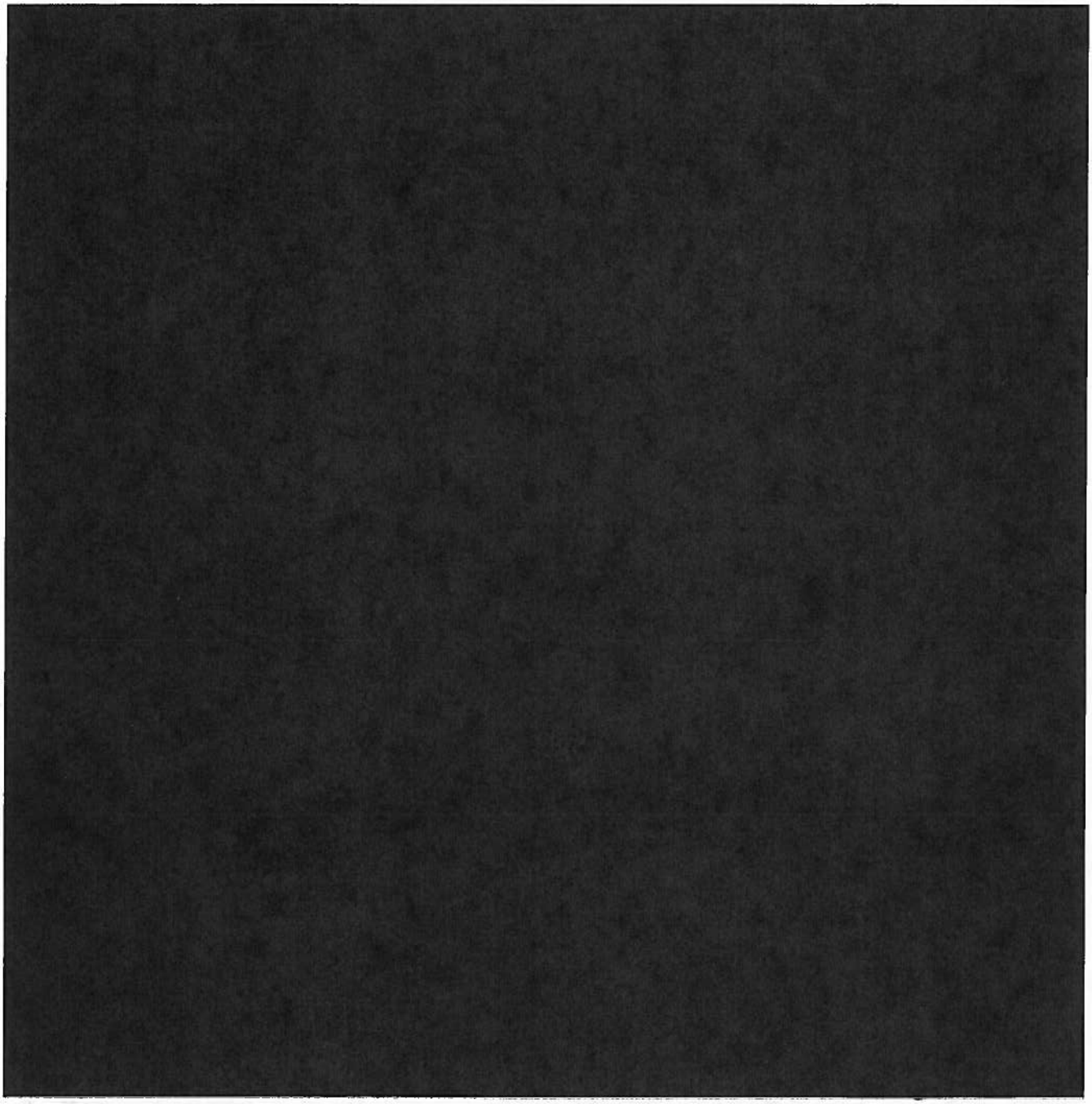
Director Mueller told us that his earliest recollection of the Stellar Wind program was a meeting he attended at the White House with Attorney General Ashcroft, which occurred either after the decision had been made to move forward with the presidentially authorized program or shortly after the October 4, 2001, Authorization was issued. Mueller told us the meeting was "more than a formal read-in" and that Director Hayden may have attended. Mueller said that at or around this time he also briefly reviewed the October 4, 2001, Presidential Authorization, which he characterized as "relatively complex." ~~(TS//SI//OC/NF)~~

Director Mueller said his impression at the time was that the terms of the Presidential Authorization might allow for collecting purely domestic telephone and e-mail communications. Mueller said he discussed the matter with Ashcroft and asked whether OLC had issued an opinion on the program. Mueller said that he recalled being told that OLC might have opined orally on the program and Mueller said he suggested to Ashcroft that OLC issue a formal written opinion. Mueller told us that he did not think the NSA ever exercised authority under the Authorization to collect purely domestic communications. ~~(TS//STLW//SI//OC/NF)~~

Mueller stated that based on the meeting he attended at the White House and his brief review of the October 4, 2001, Presidential Authorization, he understood the FBI's role in the Stellar Wind program was to be a "recipient" of intelligence generated by the NSA, and to provide any technical support to the NSA as necessary to support the program. ~~(TS//SI//NF)~~

B. [redacted]

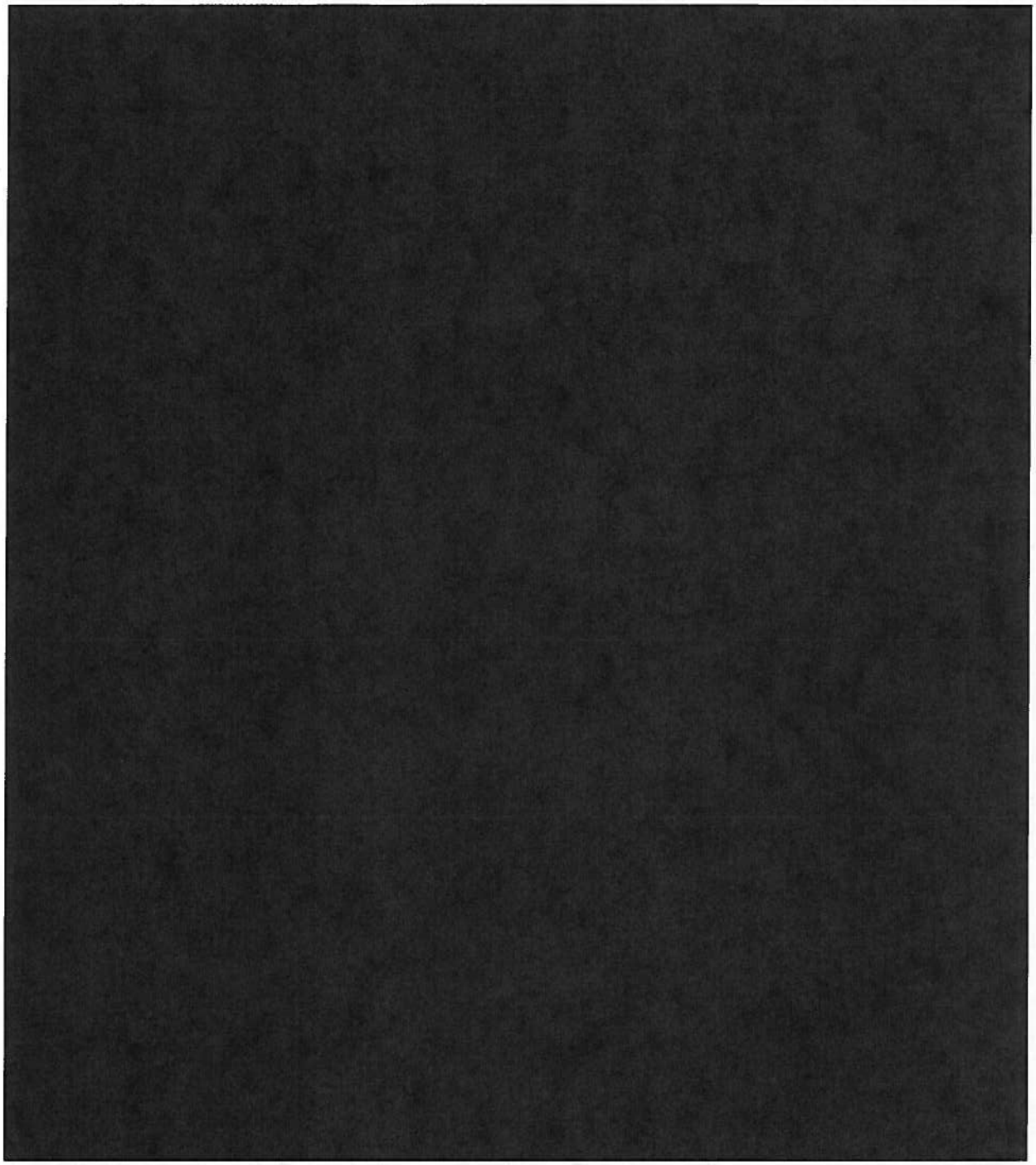
[redacted]



[redacted]

[70] Executive Order 12333 authorizes the FBI to provide operational support to the Intelligence Community. (U)

[71] [redacted]



Mueller said he therefore decided to request an order from the

Attorney General formally directing the FBI to support the NSA program. Mueller said that he also requested the order because he wanted a "record as to our participation." ~~(TS//STLW//SI//OC/NF)~~

In response, on October 20, 2001, Attorney General Ashcroft sent a memorandum to Director Mueller stating:

> As part of the Nation's self defense activities, the National Security Agency (NSA) is engaged in certain additional collection activities, the details of which you are aware. Those activities are legal and have been appropriately authorized, and the Federal Bureau of Investigation should cooperate with NSA as necessary for it to conduct those activities. ~~(TS//SI//NF)~~

According to Mueller, the combination of this memorandum from the Attorney General and the November 2, 2001, memorandum prepared by the Department's Office of Legal Counsel regarding the legality of Stellar Wind gave him comfort at that time with the FBI's participation in the program. ~~(TS//SI//NF)~~

[redacted]

Bowman also told us that the White House officials primarily responsible for Stellar Wind, who he identified as the Vice President and Addington, were "amateurs" when it came to intelligence work. Bowman stated that one of the potential consequences of severely limiting the number of individuals read into a program is that uncleared personnel who

occupy positions placing them in close proximity to program-related activities might construe certain actions as questionable or illegal and report that activity, thereby potentially compromising the activities. Bowman said that this is what occurred with Stellar Wind. For this reason and others, Bowman did not agree with the decision to so severely limit access to the program. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

C. FBI Begins to Receive and Disseminate Stellar Wind "Tippers" ~~(S//NF)~~

In the immediate aftermath of the September 11 terrorist attacks, the FBI had created a task force of agents and analysts to analyze the flood of telephone numbers it received from multiple sources, including agencies within the U.S. Intelligence Community, foreign intelligence services, and concerned citizens. The task force, called the Telephone Analysis Unit (TAU), was located at FBI Headquarters and consisted of approximately 50 FBI employees working on shift rotations 24 hours per day, 6 days per week. The operation was supervised by FBI supervisors working out of the FBI's Strategic Information and Operations Center. As described below, personnel assigned to this task force were among the first at the FBI to handle Stellar Wind-derived information. ~~(TS//STLW//SI//OC/NF)~~

1. FBI Initiates [redacted] ~~(S//NF)~~

In October or November 2001, several TAU analysts were assigned to what came to be called the [redacted] which was the FBI's effort to manage the Stellar Wind-derived information being received from the NSA. The information, referred to as Stellar Wind "tippers," consisted of telephone numbers and e-mail accounts derived from NSA meta data analysis, and sometimes content intercepted from particular telephone and e-mail communications. The essential purpose of the [redacted] was to receive Stellar Wind tippers from the NSA and disseminate the information to FBI field offices for investigation in a manner that did not reveal the source of the information or the methods by which it was collected. ~~(TS//STLW//SI//OC/NF)~~

Working alternating shifts in the FBI's Strategic Information and Operations Center, two FBI analysts were primarily responsible for managing Stellar Wind tippers in the initial months of the program. These analysts told the OIG that until December 2001, the Stellar Wind tippers

consisted nearly exclusively of telephone numbers. According to the analysts, the process for handling Stellar Wind tippers began when the NSA liaison co-located at FBI Headquarters provided one of the analysts the information below the tearline from a Stellar Wind report containing one or more tippers. The analyst then queried FBI databases for any information about each tipper, such as whether the tipper appeared in any pending or closed FBI investigations. The analyst also queried the tipper against the FBI's [redacted] database, which is the FBI's central repository for telephone subscriber data acquired during the course of investigations. In addition, the analyst checked each tipper against public source databases for relevant information, such as the identity of a telephone number subscriber. ~~(TS//STLW//SI//OC/NF)~~

After completing these database checks, the analyst drafted an Electronic Communication, or EC, from FBI Headquarters to the appropriate FBI field office. The EC described the tearline information about the tipper contained in the Stellar Wind report together with any additional information the analyst was able to locate. ~~(TS//STLW//SI//OC/NF)~~

The [redacted] ECs disseminated to field offices included several features concerning the nature of the information and how it could be used. First, the ECs advised the field offices that the information being provided was "derived from an established and reliable source" and that it was "being addressed by the TAU as the [redacted]"[72] ~~(S//NF)~~

Second, the ECs included a caveat about the use of the information being provided, stating that the information "is for lead purposes only and is intended solely for the background information of recipients in developing their own collateral leads. It cannot be used in affidavits, court proceedings, subpoenas, or for other legal or judicial purposes." The FBI said this language was included in each EC to protect the source of the information and the methods by which it was collected. ~~(S//NF)~~

Third, the ECs provided an explanation about the qualitative rankings assigned to the tippers. As described previously, the NSA assigned each tipper a [redacted] ranking [redacted][73] ~~(TS//SI//NF)~~

72 [redacted] ~~(S//NF)~~

73 [redacted]

(Cont'd.)

Fourth, the ECs instructed the field offices how the tippers should be addressed. These instructions were provided as "leads," for which the FBI had three categories: Action, Discretionary, and For Information. An Action lead instructed a field office to take a particular action in response to the EC. An Action lead was "covered" when the field office took the specified action or conducted appropriate investigation to address the information in the EC. A Discretionary lead allowed the field office to take whatever action it deemed appropriate. A field office that receives a "For Information" lead was not expected to take any specific action in response to the EC other than possibly route the communication to the office personnel whose investigations or duties the information concerned. ~~(S//NF)~~

After the FBI analyst completed this process and drafted the EC, an FBI Supervisory Special Agent read into the Stellar Wind program reviewed the EC, in part to ensure that it did not reveal the source of the information or the method by which the information was obtained. Once approved, the analyst entered the EC into the FBI's Automated Case Management System and the receiving field offices were notified electronically to review the communication. ~~(TS//SI//NF)~~

Each [redacted] EC typically contained multiple tippers and therefore was distributed to multiple field offices. The receiving field offices were responsible for handling the leads that concerned tippers falling in their respective geographic jurisdictions. ~~(S//NF)~~

Most of the [redacted] leads that disseminated Stellar Wind tippers were designated Action leads. As noted, during this period the tippers were almost exclusively telephone numbers. Accordingly, the typical lead instructed the field office to [redacted] The lead also instructed the field office to report the investigative results to the Telephone Analysis Unit. ~~(TS//SI//NF)~~

The two [redacted] analysts told us that the focus of their work in the first months after the September 11 attacks was to detect what many believed was an imminent second attack. During this period, nearly all of the Stellar Wind tippers the FBI received were disseminated to a field office for investigation as quickly as possible. ~~(S//NF)~~

In addition to tippers containing the content of intercepted telephone and e-mail communications (content tippers), in approximately December

[redacted] ~~(TS//SI//NF)~~